

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

75-2068

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WAYNE CARLSON,)
Plaintiff-Appellant)
v.)
R. KENT STONEMAN, Commissioner of)
Corrections for the State of Vermont,)
PAUL DAVALLOU, Warden, Vermont State)
Penitentiary,)
JULIUS MOEKENS, Warden, Vermont)
State Penitentiary,)
THREE UNKNOWN CORRECTIONAL OFFICERS,)
acting in their capacities as Correc-)
tions Officers at the Vermont State)
Penitentiary,)
Defendants-Appellees)

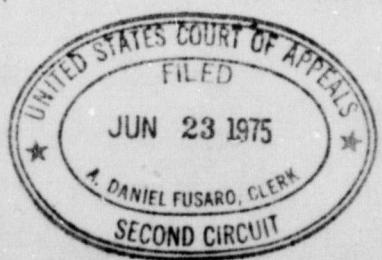
ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

APPENDIX OF PLAINTIFF-APPELLANT

James R. Flett, Esq.
Defender, Correctional Facilities
State Office Building
Montpelier, VT 05602

Andrew B. Crane, Esq.
Office of the
Defender, Correctional Facilities
State Office Building
Montpelier, VT 05602



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CIVIL DOCKET
UNITED STATES DISTRICT COURT

Civ. 74-224

Jury demand date:

CUFFRIN

C. Form No. 100 Rev.

TITLE OF CASE		ATTORNEYS				
		For plaintiff: pro se James R. Flett, Esq. Office of Defender General 43 State Street Montpelier, VT 05602				
WAYNE CARLSON						
vs.						
J. V. MOEKENS , Warden, Vermont State Penitentiary, R. K. STONEMAN , Commissioner of Corrections, State of Vermont and THREE UNKNOWN CORRECTIONAL OFFICERS , acting in their capacity as Correctional Officers at the Vermont State Penitentiary, and NORMAN A. CARLSON , Director of U. S. Prisons, Washington, D. C., et al		For defendant: Alan W. Cook, Ass't. Atty. Gen. Department of Corrections, State of State Office Bldg., Montpelier, Vt. 828-2452				
<i>Severed from 11-27-74 rest of case</i>		U. S. Attorney				
STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed OCT 4 1974	Clerk					
S. 6 mailed FEB 5 1975	Marshal					
asis of Action: Civil Rights Act USC §1983 & §1985	Docket fee Witness fees					
ction arose at: 2	Depositions					

DATE 1974	PROCEEDINGS	Date Order of Judgment No.
Sept. 4	Filed Petitioner's Affidavit of Poverty.	1.
" "	Order allowing Pltf. to proceed in forma pauperis without pre-payment of Clerk's or Marshal's fees; that James Flett, Esq. be appointed as counsel for pltf.	2.
" "	Complaint for Declaratory Judgment and Injunctive Relief.	3.
" "	Issued Summons.	
16	Filed Motion for Return of Pltff.	4.
17	Issued Order to Show Cause why Preliminary Injunction should not issue and delivered same to Marshal for service. Mailed copy to Pltff. and Pltff.'s Attorney.	
18	Filed Summons returned served.	5.
Oct. 23	" Answer of Dfts.	6.
24	" Govt's Motion to Dismiss.	7.
" "	Govt's Memorandum in support of Motion to Dismiss.	8.
Nov. 7	Filed Memorandum in Support of Plaintiff's Request for Return to Vermont During Pendency of Action.	9.
" 27	In Chambers before Judge Coffrin. James R. Flett, Esq. for Plaintiff. Alan W. Cook, Ass't Atty. Gen. for State of Vermont. David Reed, Ass't U. S. Atty. for Government.	
" "	Hearing on plaintiff's motion for return of plaintiff. Mr. Flett indicates that plaintiff is satisfied.	
" "	Hearing on Government's motion to dismiss statements made to Court by counsel. Decision reserved.	
" "	ORDERED: That Defendant Norman A. Carlson, etc. is severed from rest of case.	
" "	Status Conference held.	
" "	A discussion was held between Court and counsel. Counsel have been requested to stipulate as to facts of case. If a pre-trial conference is needed, counsel to advise court.	
" 29	Filed Order directed to Warden, United States Penitentiary, Marion, Illinois. Mailed copy to attorneys.	10.
Dec. 11	Filed Plaintiff's Motion to Amend Complaint.	11.
" "	Memorandum in Support of Motion to Amend Complaint by Pltf.	12.
" "	Plaintiff's Amended Complaint.	13.
" "	Notice of Taking Deposition of Julius Moeykens upon Oral Examination.	14.
16	Filed Deposition of Wayne L. Carlson.	15.
"	Filed Deposition of Julius V. Moeykens.	16.
17	" Memorandum in opposition to plaintiff's motion to amend complaint.	17.
" "	Memorandum of Law.	18.
"	In Chambers before Judge Coffrin. James R. Flett, Esq. for Plaintiff. Alan W. Cook, Esq. and Robert L. Orleck, Esq. for Defendants.	
"	Hearing on plaintiff's motion to Amend Complaint.	
"	ORDERED: Motion granted.	
"	A discussion was held between Court and counsel prior to trial.	
"	Trial by Court begun before Judge Coffrin.	
"	The following witnesses sworn by Clerk were examined for Plaintiff: Wayne Lorne Carlson and Anthony F. Tanzi.	
"	Julius V. Moeykens sworn by Clerk was cross examined for plaintiff.	
18	Filed two civil subpoenas returned served.	19.
"	Julius V. Moeykens was recalled and further examined by Mr. Cook.	
"	Trial resumed.	
"	Richard C. Turner, sworn by Clerk was examined by Mr. Flett.	
"	At 10:30 AM plaintiff rests.	

(refer to next sheet)

DATE 1974	PROCEEDINGS	Date Order Judgment
Dec. 28	In Chambers - attorneys present. Mr. Cook for defendants moves to dismiss the case. Objected to by Mr. Flett.	
"	ORDERED: Motion denied.	
"	In Court - trial resumed.	
"	David A. Reed, Ass't. U.S. Attorney moves to enter his appearance in behalf of next witness. Not objected to by Mr. Flett or Mr. Cook.	
"	ORDERED: Motion granted.	
"	Michael Earl Gilliland, sworn by Clerk was examined for defendants.	
"	The following witnesses sworn by Clerk were examined for defendants: Cornelius D. Hogan, Maurice E. Lemere, Ignace Walter Kapuscinski, Frederick Alden Jacobs, Harold A. Roberts and George E. Mayo.	
"	At 3:45 AM defendants rests. Plaintiff rests. Evidence closed.	
"	Taken under advisement.	
"	Mr. Flett to file any memorandum by 12-24-74. Defendants have five additional days to file reply memo.	
" 24	Filed Defts' Answer to Amended Complaint.	20.
" "	Pltf's Memorandum of Law.	21.
" 31	Filed Defts' Memorandum of Law Facts.	22.
1975		
Jan. 24	" Opinion and Order--Pltf's application for a preliminary and permanent injunction and other requested relief is denied. Judgment shall be entered for the Defts. Mailed copy to attys	23.
"	Filed Judgment on Decision by the Court - that plaintiff's application for a preliminary and permanent injunction and other requested relief is denied. Judgment is entered for the defendants. Copy mailed to counsel of record.	24.
29	Filed Pltfs. Motion for Rehearing.	25.
" "	Pltfs. Memorandum of Law in support of Motion for Rehearing.	26.
Feb. 10	Filed Memorandum in Opposition to Motion for Rehearing.	27.
Feb. 24	In Chambers before Judge Coffrin, hearing on plaintiff's motion for rehearing. James R. Flett, Esq. and Andy Crane, Esq. for Plaintiff; Alan W. Cook, Esq. for Defendants.	
"	Decision reserved.	
Mar. 13	Filed Opinion and Order--Pltf's motion for rehearing is denied. This disposition of the matter makes it unnecessary to decide whether Fed. R. Civ. P. 59(a) was properly invoked by Pltf to raise the matters discussed herein. Mailed copy to attys.	28.
Mar. 14	Filed Pltf's Notice of Appeal. Mailed copy to Judge Coffrin. Mr. Fusaro, Mr. Cook, Mr. Cummings and Mr. Flett.	29.
May 5	" Pauper Affidavit & Order -- granting permission to appeal proceeding without prepayment of fees or costs or security therefor. Mailed copy to attys.	30.
May 20	Mailed Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, New York, N. Y. Attys. notified.	
May 21	Mailed Supplemental Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, New York, N. Y. Attys. notified	
"	Filed Transcript of Trial by Court held December 17-18, 1974.	31.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON,)
Petitioner,)
vs)
J.V. MOEKENS, Warden Vermont)
State Penitentiary, R.K. STONEMAN,)
Commissioner of Corrections, State) Civil No. 74-224
of Vermont and THREE UNKNOWN)
CORRECTIONAL OFFICERS, Acting in)
their capacity as Correctional)
Officers at the Vermont State)
Penitentiary, and NORMAN A. CARLSON,)
Director of U.S. Prisons, Washington,)
D.C., et. al.,)
Respondents)

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF

JURISDICTION

1. This is an action for a declaratory judgment that rights secured to the petitioner by the Due Process Clause of the Fourteenth Amendment to the United States Constitution have been and continue to be violated by Respondents herein in the administration of prison discipline, with particular reference to the policy governing out of State transfers of State Prisoners in the Vermont State Penitentiary. This is also a proceeding for a preliminary and permanent injunction preventing Respondents from continuing to violate Petitioner's rights, while acting under color of State Law.

2. Jurisdiction is conferred on the court under 28 U.S.C. §1334 providing for jurisdiction over claims arising under 42

U.S.C. §1983 and 1985, and 28 U.S.C. §2201 and 2202 relating to declaratory judgments.

PARTIES

1. Petitioner Wayne Carlson is a legally sentenced prisoner of the State of Vermont, who is presently incarcerated at the United States Penitentiary at Marion, Illinois. He is of legal age, and a citizen of Canada, who, at the time of his arrest and subsequent incarceration, was residing in the State of Vermont.

2. Respondent J.V. Moeykens is Warden of the Vermont State Penitentiary. He is such in his official capacity. As Warden of the aforesaid institution he is responsible for general supervision and control of the Vermont State Penitentiary.

3. Respondent R.K. Stoneman is the Commissioner of Corrections, State of Vermont. He is such in his Official capacity. As Commissioner he exercises general supervision of Vermont Correctional Facilities, including the Vermont State Penitentiary.

4. Respondents designated as Three Unknown Correctional Officers are correctional officers employed by the State of Vermont. They are such in their official capacity. As correctional officers they are involved in the day-to-day supervision of custody at the Vermont State Penitentiary.

FACTS

1. On or about March 11, 1974, at approximately 4:00 p.m. petitioner was taken from his housing unit at the Vermont State

Penitentiary and was placed in the Punitive Segregation Unit of said Penitentiary. That at the time of this occurrence, to the best of petitioner's knowledge and belief, no charge had been made against him nor had he committed any infraction of the rules of said penitentiary.

2. On or about March 13, 1974, petitioner was removed from the segregation cell and taken to a room in the same unit where he was notified by Respondent Warden Moeykens that petitioner was being transferred to a federal prison in another state. Petitioner vigorously protested this action and demanded to know why, and further demanded that he be allowed to contact counsel, and informed Respondent Moeykens that petitioner was at that very moment involved in litigation then pending in the Courts of the State of Vermont, including, but not limited to appeal of the criminal conviction under which he was imprisoned; said request was refused and no reason was given, and at no time during this brief meeting was petitioner informed of any charges against him.

3. Following the above described meeting, petitioner was returned to the segregation cell where, on that same day, at approximately 4:00 p.m., an officer on duty in the segregation unit handed petitioner a written notice stating that he would be transferred forthwith to the United States Penitentiary at Lewisburg, Pennsylvania.

4. On or about March 14, 1974, at approximately 2:30 a.m. petitioner was placed in chains by Respondents herein designated as Three Unknown Correctional Officers and forcibly and against

his will removed from the Vermont State Penitentiary and was carried across several states and delivered to authorities at the United States Penitentiary at Lewisburg, Pennsylvania.

5. On or about July 24, 1974, at approximately 8:30 p.m., petitioner was summoned to the Reception and Discharge area of Lewisburg Federal Prison where he was immediately placed in the Segregation Unit of the prison. Petitioner was then told he was being transferred.

6. On or about July 25, 1974, at approximately 5:30 a.m. petitioner was removed from Lewisburg Federal Prison and taken against his will to Terre Haute Federal Prison at Terre Haute, Indiana.

7. On or about July 26, 1974, at approximately 7:00 p.m. petitioner was placed in the Terre Haute Federal Prison's Segregation Unit for a period of approximately thirteen (13) days.

8. On or about August 8, 1974, petitioner was taken from Terre Haute Federal Prison at Terre Haute, Indiana to Marion Federal Prison, Marion, Ill.

9. Petitioner is presently confined in Marion Illinois Federal Prison.

STATEMENT OF CLAIM

1. Respondents acting together, by their intentional acts and omissions, under color of law, have violated and continue to violate 42 U.S.C., §1983 and 1985 in that petitioner has been subjected to a deprivation of his Fifth and Fourteenth Amendment rights to Due Process of Law, and Sixth and Fourteenth Amendment rights to effective legal assistance in the following

manner:

- a) Petitioner was given no notice of the date and time of pending disciplinary proceedings and no statement of the charges against him and was thereby denied the opportunity to prepare an adequate defense to said charges.
- b) Petitioner was subjected to disciplinary proceedings by Respondents but was given neither the right to confront and examine his accusers nor the right to present witnesses in his own behalf.
- c) Petitioner was denied access to legal counsel.
- d) To the best of petitioner's knowledge and belief, there is no requirement that decisions reached in disciplinary proceedings be based on substantive evidence adduced at a hearing or that the reasons for the decision be either entered in the record or given to the inmate involved.
- e) No adequate record of what purported to be a hearing was made.
- f) There was no opportunity for petitioner to appeal either the findings of fact or the punishment imposed subsequent thereto.

2. That as a result of Respondents actions and omissions herein complained of, petitioner has and will continue to suffer grievous loss, to wit:

- a) An increased difficulty in communicating and visiting with members of his family and friends.
- b) He has been deprived of access to all personal belongings and especially his legal papers, thereby precluding him from going forward with certain matters now pending before

the courts of the State of Vermont;

c) He has had to break off established programs both educational and rehabilitative, and orient himself to a new setting with new rules, programs and companions;

d) He was, upon arrival at the U.S. Penitentiary, required to undergo a period of "administrative segregation" even though he had not violated any rules of said institution;

e) Perhaps, most damaging of all is the fact that notice of said transfer in petitioner's record will surely denote a "troublemaker" to the Parole Board, thereby jeopardizing his chances of being released on parole.

f) Petitioner has no adequate remedy at law to redress the wrongs alleged herein and this suit for declaratory judgment and injunctive relief is his only means of securing adequate relief.

MEMORANDUM OF LAW

In further support of this motion, your petitioner respectfully refers the court to the case of: Douglas Gomes vs. Anthony P. Travisono, Civil Action No. 4794, District Court of the United States for the District of Rhode Island, dated, January 16, 1973.

Other Federal Courts which have considered this question have also concluded that procedural safeguards must be implemented prior to a transfer from a State Prison to Federal Prisons, . e.g. Blair vs. Rockefeller, 469 F.2d 641 (1972); Wayne Hudson vs. Hardy, 424 F.2d 854 (1970); Jones vs. Robinson,

440 F.2d 249 (D.C. Cir 1971); Burgett vs. Texas, 389 U.S. 109 (1967); Mathews vs. Hardy, 137 U.S. App. D.C. 420 F.2d 607 (1969); Peyton vs. Rowe, 391 J.S. 54 (1968).

The courts are now holding that the procedure leading to a serious charge in a prisoner's confinement must comport with at least the most basic elements of procedural due process, Clutchette vs. Procunier, 328 F.Supp. 767 (N.D. Cal. 1971); Krause vs. Schmidt, 341 F.Supp. 1001 (W.D. Wisc. 1972); Sostre vs. McGinnis, 442 F.2d 178 (2nd. Cir. 1971), cert. denied, 404 U.S. 1049 (1972), 405 U.S. 978 (1972).

"Our constitutional scheme does not contemplate that society may convict lawbreakers to the capricious and arbitrary actions of prison officials" at 198. The right to a hearing is essential to procedural due process, Goldberg vs. Kelly, 397 U.S. 254 (1970). Goldberg has been cited as an authority for granting prison inmates a full hearing on the charges surrounding a serious change in confinement status. Krause and Clutchette, supra; Landman vs. Royster, 333 F.Supp. 621 (E.D. Va. 1971).

James W. Barrett vs. John O. Boone, et al., Civil Action No. 73-81-G, U.S. District Court, District of Mass. dated February 5, 1973..... Mr. Barrett, the petitioner, proceeding on Civil Action seeking declaratory and injunctive relief pursuant to 42 U.S.C. §1983 and 1985 and U.S.C. §2201 and 2202 for privation of rights, privileges and immunities under the 5th, 6th, 8th and 14th Amendments of the United States Constitution. Said Civil Action was filed to correct illegal transfer from Walpole

Correctional Institution in Massachusetts to a Federal Prison without regards to procedural safeguards. The court stated in part thereof:

It is hereby Ordered, Adjudged and Decreed that pending final decision of this action the defendants John O. Boone, and Raymond Porelle, their agents, servants, employees and attorneys and all other persons in active concert and participation with are enjoined from transferring plaintiff to any institution outside of Massachusetts until after notice and hearing pursuant to procedures which shall include among other procedures left to the discretion of Commissioner Boone, the following:

1. Prior written notice of the charge or basis upon which consideration is being made be given to the plaintiff three or more days before the time set for hearing.
2. A copy of the notice be simultaneously sent to plaintiff's counsel of record in this case.
3. A hearing be held upon the transfer recommendation before an impartial tribunal consisting of three or more persons to be designated by the Commissioner of Corrections, and the determination of the tribunal be based on reliable and substantial evidence.
4. Plaintiff be afforded the right to present testimony and evidence on his own behalf and to cross-examine persons giving testimony in support of his transfer.
5. The plaintiff be allowed the assistance of either counsel or a lay advocate of his choice in preparation for the

hearing and at the time of the hearing.

6. Minutes of the hearing be maintained and the same be furnished to the plaintiff and to the Commissioner prior to any final decision upon the transfer recommendation;

7. The tribunal make written findings of fact upon which its determination is based and furnish a copy to plaintiff.

Vermont State Statute:

Section 803, Chapter 13 of Title 28,
Vermont State Annotated Code, which states in part:

803. Duties of Officers and Jailers; penalty.

Any officer having the custody of a person committed or restrained of his liberty, except in cases of imminent danger of escape, 'shall' admit a practicing attorney of the state, when such a person may desire to see or consult with such person so imprisoned, alone and in private at the jail, lock-up or other place of custody. When such prisoner is about to be transferred beyond the limits of this state by a person or public officer, he shall be entitled to a reasonable delay for the purpose of obtaining counsel, and availing himself of the laws of this state for the security of personal liberty. A person who violates a provision of this section shall be fined not more than \$200.00

CONCLUSION

WHEREFORE,

Petitioner respectfully prays that this court enter judgment granting petitioner:

A. A declaratory judgment that Respondents by the acts, policies and practices complained of herein have violated petitioner's rights, secured by the Due Process Clause of the Fourteen Amendment.

B. A preliminary and permanent injunction enjoining Respondents from further punishing petitioner for having brought

suit herein.

C. A preliminary and permanent injunction setting aside the action taken against petitioner, and expunging said action from the records kept by Respondents and reinstating Petitioner to his former status as an inmate at the Vermont State Penitentiary.

D. That the court order petitioner brought before the Bar to give oral support to this motion.

E. All costs of this instant matter and;

F. Such other relief as the court may deem just and proper.

For the above reasons your petitioner respectfully prays.

Respectfully submitted,

/s/ Wayne Carlson
WAYNE CARLSON -- Pro se
Reg. No. 39402-133
P.O. Box 1000
Marion, Il 62959

State of Illinois)
) ss.
County of Williamson)

WAYNE CARLSON, being first duly sworn according to law,
deposes and says:

That I am the petitioner in the above captioned action; that
I have read the foregoing complaint, know the contents thereof,
and believe the same to be true to the best of my knowledge.

Further affiant sayeth not.

/s/ Wayne Carlson
WAYNE CARLSON

Subscribed and sworn to before me this 28th day of August,
1974.

/s/ J. S. Epperson
J. S. EPPERSON, Parole Officer

State of Illinois)
) ss.
County of Williamson)

PROOF OF SERVICE

I, Wayne Carlson, on oath, certify that I am the petitioner
in this instant cause titled, Complaint for Declaratory Judg-
ment and Injunctive Relief, and that on the _____ day of _____,
1974, I served a copy of this motion to each party named herein
by placing in the hands of an employee of the United States
Government - Caseworker - to be mailed prepaid postage to the
respective parties name and address.

I further state that the United States Government-Case-
worker's name appear before as Notary Public.

The Respondents name(s) are as follows:

J.V. Moeykens, Warden, Vermont State Penitentiary

R.K. Stoneman, Commissioner of Corrections
Vermont State Penitentiary

Three Unknown Correctional Officers
Vermont State Penitentiary

Norman A. Carlson, Director
U.S. Prisons
Department of Justice
Washington, D.C.

/s/ Wayne Carlson
WAYNE CARLSON Pro Se
Reg. No. 39402-133
P.O. Box 1000
Marion, IL 62959

Subscribed and sworn to before me this 28th day of August,
1974.

/s/ J.S. Epperson
U.S. Parole Officer-Notary

AFFIDAVIT OF POVERTY

State of Illinois)
) ss.
County of Williamson)

Comes now the Petitioner and being first duly sworn under Oath and according to law, deposes and says:

1. That I am a citizen of Canada, and a resident of Vermont and because of my poverty, I am unable to pay the costs and/or fees to file and process the Documents hereto attached, or to retain counsel to represent me in said cause.
2. That the matters and things stated by me in said documents as facts and so subscribed by me herein, are true, and those matters and things stated therein as upon information and belief, and so subscribed by me herein, I firmly believe to be true.
3. That I have sent a true and exact copy of said documents to the Respondent, and as indicated such and same being personally surrendered by me to the U.S. Government Employee/Agent whose name and seal serve as a Notarization for the purpose of mailing on the date indicated below.

/s/ Wayne Carlson
WAYNE CARLSON Pro Se
Reg. No.
P.O. Box 1000
Marion, IL 62959

Subscribed and Sworn to before me this 28 day of August,
1974.

/s/ J.S. Epperson
U.S. Parole Officer-Notary

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Wayne Carlson :
:
v. :
:
J. V. Moeykens, Warden, :
Vermont State Penitentiary, :
R. K. Stoneman, Commissioner :
of Corrections, State of :
Vermont and Three Unknown : Civil Action File No. 74-224
Correctional Officers, :
Acting in their capacity as :
Correctional Officers at the :
Vermont State Penitentiary, :
and Norman A. Carlson, :
Director of U. S. Prisons, :
Washington, D.C. :
:
:

ORDER

Upon consideration of plaintiff's application to file
a civil rights complaint, in forma pauperis, and the affidavit
attached thereto, it is hereby ORDERED:

That plaintiff may file and the Clerk of this Court shall
accept said complaint without prepayment of the required fee
and that the plaintiff shall not be required to pay the Marshal's
fees for service of the same.

It is further ORDERED:

That James Flett, Esq., be and he hereby is appointed as
counsel for plaintiff.

Dated at Burlington in the District of Vermont, this 4th
day of September, 1974.

/s/ Albert W. Coffrin
District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON,

Petitioner,

v.

J. V. MOEKENS, Warden, Vermont State
Penitentiary,

R. K. STONEMAN, Commissioner of Correc-
tions, State of Vermont,

THREE UNKNOWN CORRECTIONAL OFFICERS,
acting in their capacity as Correctional
Officers at the Vermont State Peniten-
tiary, and

NORMAN A. CARLSON, Director of U.S.
Prisons, Washington, D.C., et al.

Respondents.

Civil Action
File No. 74-224

MOTION FOR RETURN OF PLAINTIFF

NOW COMES the Plaintiff by and through his attorney, James R. Flett, and moves the Honorable Court as follows:

1. That Plaintiff has filed a verified complaint requesting preliminary injunctive relief and an immediate hearing on the legality of the disciplinary proceeding whereby he was transferred out of the State of Vermont.
2. That it is absolutely essential that Plaintiff be in attendance at the show cause hearing that Plaintiff requested to contest the legality of his transfer.
3. That Plaintiff is presently lodged at Marion, Illinois, under the control of the Defendants.

4. That adequate preparation of Plaintiff's case cannot be done without the presence of Plaintiff in State of Vermont prior to the date of the hearing on the show cause order.

WHEREFORE, Plaintiff requests that the Court order Defendants to return Plaintiff to Vermont forthwith.

DATED at Montpelier, Vermont, this 12th day of September, 1974.

WAYNE CARLSON

By:/s/ James R. Flett

JAMES R. FLETT

Defender, Correctional Facilities
Attorney for Plaintiff
43 State Street
Montpelier, VT 05602
802-828-3194

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON,

Plaintiff,

v.

J. V. MOEYKENS, Warden, Vermont State Penitentiary,

R. K. STONEMAN, Commissioner of Corrections, State of Vermont,

THREE UNKNOWN CORRECTIONAL OFFICERS, acting in their capacities as Correctional Officers at the Vermont State Penitentiary, and

NORMAN A. CARLSON, Director of U.S. Prisons, Washington, D.C., et al.,

Defendants.

Civil Action File
No. 74-224

MEMORANDUM IN SUPPORT OF PLAINTIFF'S REQUEST FOR RETURN

TO VERMONT DURING PENDENCY OF ACTION

I. INTRODUCTION

On or about March 14, 1974, in the early morning Plaintiff, Wayne Carlson, was transported from the Windsor Correctional Facility where he was a prisoner of the State of Vermont to the Federal Prison at Lewisburg, Pennsylvania. Plaintiff has filed a pro se civil rights action dated August 28, 1974, attacking the constitutionality of the transfer primarily on Due Process grounds. On or about September 4, 1974, this Court granted Plaintiff's motion to proceed in forma pauperis and appointed counsel below signed to represent Plaintiff on his complaint.

Plaintiff is presently incarcerated at the Federal Penitentiary at Marion, Illinois.

From the pro se complaint, Vermont Department of Corrections' records and files and limited contact with the Plaintiff, it would appear that Plaintiff was transferred pursuant to 28 V.S.A §§1601 - 1621 titled the Interstate Corrections Compact and 28 V.S.A. §706.

Plaintiff claims that on or about March 11, 1974, in the afternoon he was taken from his cell in the general population at the Windsor Correctional Facility and placed in Punitive Segregation at said facility. Plaintiff maintains that no disciplinary actions were pending against him at that time. The Department of Corrections alleges that Plaintiff was given oral notice on the evening of March 11, 1974, that the State of Vermont proposed to transfer Plaintiff to the Federal Penitentiary at Lewisburg, Pennsylvania. The Department further states that Plaintiff was entitled to a hearing before the Warden or Supervising Officer, Julius V. Moeykens, on March 13, 1974, in the morning of that day. The Department further alleges that Plaintiff was given the opportunity to waive the hearing or if he elected to have the hearing he could have a staff member representing him and could have called a reasonable amount of relevant witnesses. Plaintiff disputes that he was given oral notice of this procedure on March 11, 1974.

The Department alleges that on or about March 12, 1974, Plaintiff was given written notice of the proposed transfer of

Plaintiff to the Federal Penitentiary at Lewisburg, Pennsylvania which was to occur on March 13 or March 14, 1974, under the terms of the agreement between the State of Vermont and the United States. The reason given for the transfer on the written notice was that Plaintiff's repeated escapes and the violent nature of those escapes rendered all Vermont facilities unsuitable because there were no adequate treatment and rehabilitation programs available for an individual with the level of security Plaintiff required.

The written notice further stated that a hearing on the proposed transfer would take place the following morning, March 13, 1974, at 8:30 a.m. before J. V. Moeykens, Supervising Officer of the Windsor Correctional Facility.

The notice further stated that at the hearing Plaintiff could call any relevant witnesses who were available, make any statements Plaintiff wished to, ask any questions that were relevant and be assisted by a staff member of Plaintiff's choice, if J. V. Moeykens could determine that said person was reasonably available.

The alleged notice further stated that Plaintiff could waive his hearing and agree to the transfer.

The alleged notice also required Plaintiff to affirmatively request the hearing, state what staff officer, if any, he would like to assist him and list his witnesses. The alleged notice also required Plaintiff to notify J. V. Moeykens by twelve o'clock noon on the 12th of March, 1974, if he wished to implement any part of the proposed hearing procedure.

Plaintiff who had pending criminal charges at that time states that he was not given this alleged notice until on or about twelve o'clock noon on the 12th of March. Plaintiff also states that he had been advised by legal counsel not to sign anything or say anything relative to any pending or contemplated criminal charge. Plaintiff states that he requested the opportunity to contact his attorney, Mr. Edward Kiel, on the matter of the hearing and was denied this request.

Plaintiff alleges that the implementation procedure for the projected hearing which requested that he affirmatively request said hearing or waive the hearing in effect waived certain rights that Plaintiff was of the opinion he was entitled to such as representation by legal counsel. He had been advised by his counsel at that time not to sign anything without counsel's consent but was denied the opportunity to discuss the hearing procedure with counsel.

Plaintiff alleges that he may have been entitled to legal counsel at that hearing pursuant to Department of Corrections policy in effect at that time.

Plaintiff would dispute that he was given adequate notice of the hearing, that he was informed of the charges against him, and that he was allowed adequate time to prepare his case.

The Department alleges that on or about March 13, 1974, at 8:30 a.m. the Department attempted to hold a hearing to determine if Plaintiff should be disciplined by being transferred to Lewisburg. This attempted hearing which was recorded was conducted by J. V. Moeykens, Superintendent of the Windsor Correctional

Facility, acting as hearing officer. No evidence was introduced by the State to substantiate the alleged reasons for transfer. The alleged hearing officer placed the burden of proof on Plaintiff by telling him that he would be transferred unless he could show cause why he should not be transferred. The alleged hearing officer informed Plaintiff that no hearing was required as Plaintiff did not affirmatively request said hearing as directed by the hearing officer in his role as Superintendent of the Windsor Correctional Facility.

Plaintiff was denied the request for counsel, legal or lay, because he did not affirmatively request said assistance.

Plaintiff was acting on the advice of his attorney given before the notice of hearing and notice of the pending charges against him. Plaintiff was not allowed to further talk with his attorney before the request for lay counsel had to be made.

A notice of decision was prepared by the alleged hearing officer which included facts that were not presented at the attempted hearing. In fact it would appear that the State presented no evidence at the hearing but required the Plaintiff to overcome a presumption of guilt.

Plaintiff was transferred the next day to Lewisburg, Pennsylvania.

Plaintiff filed his complaint requesting injunctive relief. Pursuant to said filing, the below-signed attorney was appointed by this Court to assist Plaintiff in preparing his case. Communication with Plaintiff at Marion, Illinois, has been accomplished by telephone and mail. Plaintiff has alleged that telephone

conversations are conducted in the presence of corrections officials, and Plaintiff has declined to discuss certain matters because of the method of communication. The below-signed attorney would state that although he is entitled to speak to Plaintiff, there are delays sometimes of a day before the conversation can take place.

Plaintiff has also alleged to counsel that mail from the below-signed attorney to Plaintiff has been tampered with.

Plaintiff has alleged to counsel that because of the threat, imaginary or real, of his mail being read to counsel that he has been unwilling to state certain facts to counsel.

Plaintiff has alleged that as a result of his transfer he has:

1. Been placed in administrative segregation at Lewisburg upon arrival there for a period of time.
2. Been advised by the Classification Committee at Lewisburg that they shoot people at the top of the walls,
3. Been advised he has a reputation as an escape artist,
4. Remained unclassified for approximately seven weeks,
5. Been labeled a security risk by the federal corrections persons,
6. Been denied visitation opportunities,
7. Been treated differently and worse in his opinion in the federal penitentiary than he has been in Windsor,
8. Been denied personal property as a result of the transfer,
9. That state prisoners in the federal prison system are discriminated against by both the corrections people and the federal inmates,

10. That his corrections records have not accompanied him,
11. That he was denied effective assistance of counsel on charges pending at the time of his transfer.

Plaintiff in all likelihood has suffered additional hardships as a result of the transfer which can only be explored and ascertained upon personal contact with the Plaintiff.

II. CLAIM

Plaintiff alleges denial of due process in the transfer in violation of his rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

Plaintiff apparently was transferred pursuant to Vermont Statutes 28 V.S.A. §§1601 - 1621 and 28 V.S.A. §706 which reads as follows:

"The Commissioner may enter into and execute a contract or contracts with the United States for the transfer of any inmate from any facility to a federal correctional facility when, in his opinion, the inmate needs particular treatment or special facilities available at the federal correctional facility."

It would appear that Plaintiff has a claim that these statutes on their faces and as applied are unconstitutional for being violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

To effectively represent Plaintiff, it would be necessary for Plaintiff to be present in the State of Vermont during the pendency of this action so that he can effectively assist in the preparation of his case.

It is also noted that he is attacking a state statute, and in all likelihood his complaint would have to be amended to request

convening of a three-judge panel to determine the constitutionality of the statute as written and as applied.

III. JURISDICTION

It is well settled that prisoners can contest the validity of disciplinary hearings including interstate transfers under 42 U.S.C. §1983 and 28 U.S.C. §§1343, 2201 and 2202. In Wolff v. McDonnell, ____ U.S. ____, 15 Cr.L. 3304 (1974) the Court faced the question of whether or not the disciplinary proceedings complied with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This case was filed under 42 U.S.C. §1983.

The issue of interstate transfers has been litigated in lower courts, including the second circuit with 42 U.S.C. §1983 complaints. See Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1974); Hoitt v. Vitek, 361 F.Supp. 1238 (D. N.H. 1973); Ault v. Holmes, 369 F.Supp. 288 (W.D. Ky. 1973); Croom v. Manson, 367 F.Supp. 586 (D. Conn. 1973); Barrett v. Boone, ____ F.Supp. ____ (D. Mass. 1973); Kessler v. Cupp, ____ F.Supp. ____ 3 Prison L.Rptr. (D. Or. 1973).

In Vermont this Court has found that 42 U.S.C. §1983 is a proper remedy in an attack on the lack of hearing pursuant to an intraprison transfer. Bowers v. Smith, 353 F.Supp. 1339 (D. Vt. 1972).

Injunctive relief is certainly a proper remedy in actions of this type. (See generally the above-cited cases)

IV. LEGAL CLAIM

Plaintiff alleges that he was not afforded due process of law in the interstate transfer from Windsor to Lewisburg.

It has been held that an interstate transfer of a prisoner is a sufficient deprivation of rights and a sufficient change in confinement status to require a prior due process hearing.

Ault v. Holmes, supra; Gomes v. Travisono, supra; Hoitt v. Vitek, supra; Croom v. Manson, supra; Capitan v. Cupp, 356 F. Supp. 302 (D. Or. 1972); Barrett v. Boone, supra; and Kessler v. Cupp, supra.

The Department of Corrections apparently agrees as it attempted to provide Plaintiff with a hearing.

The second question is what type of hearing must a person in Plaintiff's position be given to comply with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In Vermont the question of the extent of a hearing necessary to transfer a person from one portion of the prison at Windsor to another was decided in Bowers v. Smith, supra. The transfer in Bowers subjected the plaintiffs to administrative segregation which was determined to be a serious change in confinement status. The court concluded that the prisoners were entitled to a hearing and stated:

"Their right to a hearing shall include notice of the charges against them, a fair and impartial determination, and the opportunity to call witnesses and cross-examine adverse witnesses. Each prisoner shall have the assistance of staff or lay counsel at the hearing and a record of the testimony shall be kept." Page 1346

Recently the United States Supreme Court has determined what type of hearing is required in a situation where the prisoner's status would substantially change. Wolff v. McDonnell, supra.

The court held that Due Process would be afforded when the Plaintiff had:

1. "Advance written notice of the claimed violation" 15 Cr.L. 3312
2. "A written statement of the factfindings as to the evidence relied upon and the reasons for the disciplinary action taken." 15 Cr.L. 3312 citing Morrissey v. Brewer, 406 U.S. 489 (1972)
3. "The advance notice must be given at least 24 hours before the hearing." 15 Cr.L. 3312
4. "[The right] to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional needs." 15 Cr.L. 3312
5. "No constitutional right to confrontation and cross-examination in hearing." 15 Cr.L. 3313
6. "No right to legal or lay counsel." 15 Cr.L. 3314
7. "A sufficient impartial hearing officer." 15 Cr.L. 3314

It would appear from limited contact with the Plaintiff and information obtained from the Corrections Department, that Plaintiff has several claims.

First, the method of attempting to provide Plaintiff with a meaningful hearing was a sham. Due Process should not require a prisoner facing a serious change in incarceration to his detriment to have to affirmatively assert his constitutionally protected rights as required in the alleged proceeding in this case. There is no evidence of a voluntary waiver of the due process procedural safeguards as asserted by the hearing officer.

Secondly, advance written notice in this case consisted of almost no time according to the Plaintiff. Plaintiff alleged that he obtained written notice on or about twelve o'clock on March 12, 1974. The written notice obtained required affirmative action by Plaintiff prior to twelve o'clock on March 12, 1974, to preserve his due process rights.

Thirdly, the advance written notice did not contain written notice of the claimed violation instead it gave a conclusion as follows:

"This transfer is proposed for the following reasons. Your repeated escapes and the violent nature of those escapes renders all Vermont facilities unsuitable because there are no adequate treatment and rehabilitative programs available for an individual with the level of security you require."

Advance written notice to the prisoner is required "to inform him of the charges and to enable him to marshal the facts and prepare a defense." Wolff, supra, p. 15 Cr.L. 3312

Fourthly, the opportunity provided by the Warden, J. V. Moeykens, to allow a staff member to assist Plaintiff and the opportunity to call relevant witnesses may have been meaningless if the Plaintiff's versions of the facts are substantiated. Plaintiff has alleged that he was given no time in which to contact his attorney pursuant to the attorney's earlier request nor was the written notice given to him in time to return it to the supervising officer.

Fifth, no evidence was presented at the hearing by the Department of Corrections. A listening of the tape of the hearing will clearly substantiate this deficiency. The lack of

introduction of evidence violates the requirement of a written decision based on the evidence relied upon because no evidence was submitted. The written notice of decision has findings of fact that were not mentioned at the hearing:

"Your last two escapes have been from the most secured general housing area of this maximum security facility. Both have involved assaults. Your most recent escape on March 11, 1974, involved especially dangerous conduct. It is apparent that we do not have facilities in Vermont capable of programming you on a long-term basis."

Finally, the Plaintiff has a claim that the hearing officer who ordered the transfer can hardly be described as sufficiently impartial. J. V. Moeykens was at the time the Superintendent of the Windsor Facility and had been for some time. Prior to that he had been the Deputy Supervising Officer at the Windsor Facility. Due Process would require a hearing conducted in front of a board or officer sufficiently impartial to insure an objective determination.

V. CONCLUSION

Plaintiff, based on his verified complaint, my limited contact considering Plaintiff's alleged reluctance to converse freely and the Department's records show that Plaintiff has an actionable claim. In order to properly prepare further because of the Plaintiff's stated reluctance to converse freely by telephone or mail and the obvious difficulties in preparation of a case of this type without free access to the client, make it imperative that Plaintiff be returned to Vermont before any further portions of his case can be adequately prepared and presented.

DATED at Montpelier, County of Washington and State of Vermont, this 27th day of September 1974.

Respectfully submitted,

/s/ James R. Flett

JAMES R. FLETT
Defender, Correctional Facilities
Attorney for Plaintiff
43 State Street
Montpelier, VT 05602
802-828-3194

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of September, 1974 at Burlington, Vermont, I hand delivered a copy for each Defendant of the above Memorandum in Support of Plaintiff's Request for Return to Vermont During Pendency of Action with a copy of this Certificate appended thereto to Alan W. Cook, Attorney for Defendants.

/s/ James R. Flett

JAMES R. FLETT
Defender, Correctional Facilities
Attorney for Plaintiff
43 State Street
Montpelier, VT 05602
802-828-3194

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON,)
Plaintiff,)
v.)
J. V. MOEYKENS, Warden, Vermont)
State Penitentiary; R. K.)
STONEMAN, Commissioner of Correc-) Civil Action File No.
tions, State of Vermont; THREE) 74-224
UNKNOWN CORRECTIONAL OFFICERS,)
acting in their capacity as)
Correctional Officers at the Vermont
State Penitentiary, and NORMAN A.)
CARLSON, Director of U.S. Prisons,)
Washington, D.C., et al.,)
Defendants.)

ANSWER

FIRST DEFENSE

The Plaintiff's Complaint fails to state a claim for which relief may be granted.

SECOND DEFENSE

Defendants answer each of the numbered paragraphs as follows:

A. Under the caption "Jurisdiction":

1. Denied.
2. Denied.

B. Under the caption "Parties":

1. Denied for lack of sufficient information except to admit that Wayne Carlson was legally confined in the State

of Vermont and is presently legally confined by the federal authorities.

2. Denied.

3. Denied, except that R. Kent Stoneman is Commissioner of Corrections for the State of Vermont.

4. Denied.

C. Under the caption "Facts":

1. Denied.

2. Denied, except to admit that Plaintiff was provided with a full and complete hearing on March 13, 1974, on the subject of his proposed transfer.

3. Denied, except to admit that Plaintiff was properly notified of the decision to transfer him to the federal penitentiary.

4. Denied, except to admit Plaintiff was transferred to the federal penitentiary.

5. Denied for lack of sufficient information to justify a belief in the allegations.

6. Denied for lack of sufficient information to justify a belief in the allegations.

7. Denied for lack of sufficient information to justify a belief in the allegations.

8. Denied for lack of sufficient information to justify a belief in the allegations.

9. Denied for lack of sufficient information to justify a belief in the allegations.

D. Under the caption "Statement of Claim":

1. Denied.

a) Denied.

b) Denied.

c) Denied.

d) Denied.

e) Denied.

f) Denied.

2. Denied.

a) Denied.

b) Denied.

c) Denied.

d) Denied for lack of sufficient information to
justify a belief in the allegations.

e) Denied for lack of sufficient information to
justify a belief in the allegations.

f) Denied.

E. Under the caption "Memorandum of Law":

Defendants deny that the authorities cited give Plaintiff any right to relief.

F. Under the caption "Conclusion":

1. Denied.

2. Denied.

3. Denied.

4. Denied.

5. Denied.

6. Denied.

THIRD DEFENSE

Further answering Plaintiff's complaint, Defendants affirmatively allege that at no time have Plaintiff's constitutional rights been denied or abridged in any way.

FOURTH DEFENSE

Further answering Plaintiff's complaint, Defendants set forth the following affirmative defenses:

1. The Defendants are protected by good faith immunity.
2. This case is now moot since the Plaintiff is no longer an inmate at the federal correctional institution at Lewisburg, but has been retransferred to another federal institution. It is obvious from Plaintiff's complaint that he delayed bringing this claim until long after he was transferred, and then only when he was retransferred in the federal system.
3. No claim of specific misconduct is made against Defendants.
4. The Plaintiff has failed to exhaust his administrative remedies.
5. Plaintiff has waived any violation of his civil rights by his failure to pursue available administrative remedies.
6. The doctrine of laches bars Plaintiff's claim and the relief he requests because of his failure to timely petition for relief.
7. Defendants had probable cause to take the actions ascribed to them and have always acted in conformity with the United States Constitution.

WHEREFORE, Defendants pray that Plaintiff's request for relief be denied and that his complaint be dismissed.

Dated at Montpelier, Vermont, this 22nd day of October, 1974.

Respectfully submitted,

KIMBERLY B. CHENEY
Attorney General
State of Vermont

By:

/s/ Alan W. Cook
ALAN W. COOK
Assistant Attorney General
Department of Corrections
State of Vermont
State Office Building
Montpelier, VT 05602
(802) 828-2452

CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of October, 1974, I served a copy of the above Defendants' Answer with a copy of this Certificate appended thereto, on the Plaintiff in this matter, by mailing a true conformed copy thereof in a sealed envelope, first-class postage prepaid to James R. Flett, Esq., Defender, Correctional Facilities, 43 State Street, Montpelier, Vermont 05602.

/s/ Alan W. Cook
ALAN W. COOK
Assistant Attorney General
Department of Corrections

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON,

Plaintiff,

v.

J. V. MOEYKENS, Warden, Vermont State
Penitentiary,

R. K. STONEMAN, Commissioner of Corrections,
State of Vermont,

THREE UNKNOWN CORRECTIONAL OFFICERS,
acting in their capacities as Corrections
Officers at the Vermont State
Penitentiary, and

NORMAN A. CARLSON, Director of U.S.
Prisons, Washington, D.C., et al.,

Defendants.

Civil Action
File No. 74-224

AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

1. This is a civil rights action by Plaintiff who is presently incarcerated at the Federal Penitentiary at Marion, Illinois. Plaintiff, until March 14, 1974, was a prisoner of the State of Vermont and lodged at the State Correctional Facility at Windsor, Vermont. On or about March 14, 1974, he was transferred to the Federal Penitentiary at Lewisburg, Pennsylvania. Plaintiff or or about July 25 was transferred from Lewisburg Federal Penitentiary to the Federal Penitentiary at Marion, Illinois. Plaintiff contests the validity of the transfer from the Windsor State Prison to the Federal prison system. Plaintiff seeks preliminary and permanent

injunctive relief and declaratory relief. Plaintiff requests that the Court enjoin Defendants from incarcerating Plaintiff outside the State of Vermont and that the Court declare that Plaintiff's transfer from the State of Vermont was in violation of Plaintiff's rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

II. JURISDICTION

2. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§1343, 2201 and 2202 and 42 U.S.C. §1983.

III. PARTIES

3. Plaintiff, Wayne Carlson, is a citizen of Canada and is a prisoner of the State of Vermont presently incarcerated at the Federal Penitentiary at Marion, Illinois, pursuant to a contract entered into between the United States and the State of Vermont under 18 U.S.C. §5003 and 28 V.S.A. §706 which statutes provide for the contracting between the state and the Federal Government for placing state prisoners in the federal prison system.

4. Defendant R. Kent Stoneman is Commissioner of the Vermont Department of Corrections and is responsible for the administrative operations and staff of the entire Department, including the Windsor Correctional Facility located at Windsor, Vermont. He is given the authority pursuant to 28 V.S.A. §706 to enter into a contract with the United States Government for the transfer of a state prisoner to the federal prison system.

5. Defendant Paul Davallou is the present superintendent of the Windsor Correctional Facility and has general supervisory

powers over the operations and staff of the Windsor Correctional Facility.

6. Defendant Julius Moeykens was the superintendent of the Windsor Correctional Facility at the time of the transfer of Wayne Carlson and as such had general supervisory powers over the operations and staff of the Windsor Correctional Facility and upon information and belief the authority to transfer inmates, including Plaintiff, to the federal penitentiaries pursuant to the contract entered into between the State of Vermont and the United States under 18 U.S.C. §5003 and 28 V.S.A. §706.

7. Defendants designated as three unknown correctional officers are correctional officers employed by the State of Vermont. They are sued in their individual and official capacities and did physically remove Wayne Carlson from the State of Vermont to Lewisburg Federal Penitentairy.

IV. FACTUAL ALLEGATIONS

8. On or about July 1, 1973, Plaintiff Wayne Carlson was incarcerated by the State of Vermont at the Windsor Correctional Facility located at Windsor, Vermont. At that time Defendant Moeykens was the warden of the Windsor Correctional Facility.

9. Plaintiff and Defendant Moeykens immediately developed a mutual dislike and distrust for each other which continually manifested itself during Plaintiff's incarceration at the Windsor Correctional Facility.

10. On or about March 11, 1974, Plaintiff was placed in the Punitive Segregation area of the Windsor Correctional Facility by

Defendant Moeykens after Plaintiff had been accused of escaping from the Windsor Correctional Facility on that date.

11. Upon placement in the Punitive Segregation area, Plaintiff was informed by Defendant Moeykens that he was being transferred to the Federal Penitentiary in Lewisburg Pennsylvania.

12. Plaintiff on or about March 11, 1974, after being informed by Defendant Moeykens of Moeykens' decision to transfer Plaintiff, requested that he be allowed to contact his attorney and was denied that request.

13. Plaintiff on or about March 12 received written notification signed by Defendant Moeykens informing Plaintiff that:

"We propose to transfer you to the Federal Penitentiary at Lewisburg, Pennsylvania on March 13 or March 14, 1974, under the terms of the agreement between the State of Vermont and the United States.

"This transfer is proposed for the following reason.

"Your repeated escapes and the violent nature of those escapes renders all Vermont Facilities unsuitable because there are no adequate treatment and rehabilitative programs available for an individual with the level of security you require.

"A hearing on the proposed transfer will take place on March 13, 1974, at 8:30 a.m., before me [Moeykens].

"At the hearing, you may call relevant witnesses who are available, make any statements you wish, ask any questions that are relevant and be assisted by a staff member of your choice, if I determine he is reasonably available.

"You should indicate at the bottom of this notice the names of any witnesses you desire to have present at the hearing and the name of the staff member, if any, you desire to assist you, not later than 12:00 noon today. An additional copy of this notice is being provided to you, in order that you may retain one copy to prepare and for your records.

"If you do not wish to have a hearing on the reasons for your proposed transfer, you may so indicate by signing the waiver provided below."

14. Plaintiff, upon receipt of said notification, requested that he be allowed and was allowed to contact his attorney who advised him to sign nothing and to request that the attorney be present at any contemplated hearing.

15. It was the policy of Windsor Prison officials at this time to permit inmates representation of legal counsel at disciplinary hearings involving alleged criminal acts which these officials had referred or contemplated referring to the state's attorney for prosecution. Subsequent to Plaintiff's transfer he was charged criminally for the incident which allegedly occurred on or about March 11, 1974.

16. Plaintiff, relying on his past experience and knowledge and his attorney's advice, did not sign the written instructions furnished by Defendant Moeykens. On or about March 13, 1974, a hearing was held before Defendant Moeykens at which time Plaintiff restated his position that he be allowed legal counsel. Defendant Moeykens denied this request and proceeded to conduct a hearing at which time he acted as the hearing officer. No evidence was produced by the facility. Defendant Moeykens denied Plaintiff's request for lay counsel and a further continuance in order to prepare his case. Defendant Moeykens, acting as hearing officer, found that "your last two escapes have been from the most secured general housing area of this maximum security facility. Both have involved assaults. Your most recent escape on March 11, 1974, involved especially dangerous conduct. It is apparent that we do not

have facilities in Vermont capable of programming you on a long-term basis." On or about March 14, 1974, Plaintiff was transferred to the Lewisburg Federal Penitentiary.

17. At all times incident to this transfer, Plaintiff had pending criminal charges against him at the Vermont District Court at White River Junction and subsequent to this transfer was charged criminally for the incident that occurred on or about March 11, 1974.

18. Upon his transfer to the federal prison system, Plaintiff:

- a) was placed in administrative segregation at Lewisburg for a period of time;
- b) was subjected to repeated classification proceedings which were held without benefit of correct information concerning his incarceration by the State of Vermont;
- c) was denied visitation opportunities that were available to him at the Windsor Facility in Windsor, Vermont;
- d) was denied personal property in his possession at Windsor Prison;
- 3) was denied access to counsel on charges pending at the time of his transfer.

V. CLAIMS

19. Defendants denied Plaintiff due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution as a result of the disciplinary action and transfer from the Windsor Correctional Facility to the federal prison system without giving Plaintiff a hearing at which he was afforded the right a) to prior notice of the charges against him; b) to be presented with the evidence against him; c) to confront and cross-examine the witnesses against him; d) to have a determination made by a neutral and

detached hearing officer or officers; e) to have written findings based on the evidence presented at the hearing.

20. Defendants denied Plaintiff equal protection of the law in that they have set up two classes of disciplinary hearings when the disciplined inmate is or may be subjected to criminal proceedings. The first class is those inmates accused of disciplinary infractions where a transfer is not contemplated. These inmates are entitled to advance written notice of the charges against them, representation by legal counsel, a hearing conducted by an impartial hearing officer where a verbatim transcript is taken, an opportunity to be confronted with the evidence against them and to cross-examine witnesses for the facility, and the opportunity to present witnesses on their own behalf, a determination made by the hearing officer based on the evidence presented at the hearing, an opportunity to file an administrative appeal to the Commissioner of Corrections. The second class of persons, and upon information and belief containing only Plaintiff, are those people where the disciplinary hearing may result in transfer to the federal prison system. These people are entitled to advance written notice of the charges, the requirement of affirmatively requesting a hearing, a hearing held by a partial and non-neutral hearing officer who is also the warden of the facility, no opportunity to confront and cross-examine witnesses or to be confronted with the evidence against them, an opportunity only if affirmatively requested for the assistance of lay counsel, the opportunity to present relevant witnesses when the relevance is determined by the partial, non-neutral warden in his role as

hearing officer, and findings and conclusions not necessarily based upon any evidence presented at the hearing. No compelling state interest, or even rational basis, exists to justify the creation of these two classes, and as such this classification scheme violates Plaintiff's rights of equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

21. Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the Defendants unless this Court grants the declaratory and injunctive relief which Plaintiff seeks.

22. Plaintiff has suffered and will continue to suffer further damages as a result of incarceration outside the state of Vermont.

WHEREFORE, Plaintiff respectfully prays this Court enter judgment granting Plaintiff:

1. A declaratory judgment that Defendants' acts, policies, and practices described herein violate Plaintiff's rights as guaranteed by the United States Constitution.

2. A preliminary and permanent injunction which enj eins Defendants from further incarcerating Plaintiff outside the State of Vermont.

3. An order requiring any memoranda, disciplinary reports, write ups, or other reports incident to this transfer be removed from Plaintiff's files within the Corrections Department.

4. Such other and further relief as this Court may deem just, proper, and equitable.

DATED at Montpelier, County of Washington and State of Vermont,
this 11th day of December, 1974.

/s/ James R. Flett

JAMES R. FLETT
Defender, Correctional Facilities
Attorney for Plaintiff
43 State Street
Montpelier, VT 05602

CERTIFICATE OF SERVICE

This is to certify that on the 11th day of December, 1974, I served a copy of the above Amended Complaint with a copy of this Certificate appended thereto upon the Defendants in this matter by mailing a true conformed copy thereof to David Reed, United States Attorney, Courthouse Building, Rutland, Vermont, and Alan W. Cook, Assistant Attorney General, Department of Corrections, Montpelier, Vermont.

/s/ James R. Flett

JAMES R. FLETT
Defender, Correctional Facilities
Attorney for Plaintiff
43 State Street
Montpelier, VT 05602

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON,)
Plaintiff,)
v.)
J. V. MOEYKENS, Warden, Vermont)
State Penitentiary; R. K.)
STONEMAN, Commissioner of Correc-) Civil Action File No. 74-224
tions, State of Vermont; THREE)
UNKNOWN CORRECTIONAL OFFICERS,)
acting in their capacity as)
Correctional Officers at the Vermont)
State Penitentiary, and NORMAN A.)
CARLSON, Director of U.S. Prisons,)
Washington, D.C., et al.,)
Defendants.)

ANSWER TO AMENDED COMPLAINT

Defendants answer Plaintiff's Amended Complaint as follows:

FIRST DEFENSE

The Plaintiff's Amended Complaint fails to state a claim for which relief may be granted.

SECOND DEFENSE

Defendants answer each of the numbered paragraphs and prayer for relief as follows:

1. Defendants admit that Plaintiff was an inmate at the State Correctional Facility at Windsor, Vermont, on the date of March 13, 1974, and on March 14, 1974, was transferred to the Federal Penitentiary at Lewisburg, Pennsylvania. Defendants admit that Plaintiff is seeking preliminary, permanent injunctive and declaratory relief. All other allegations in paragraph 1 Defendants lack sufficient information to justify a belief in.

2. Does not set forth facts for which an Answer is required.

As far as an Answer may be required, Defendants deny each and every allegation of fact.

3. Defendants deny each and every allegation except to admit that Wayne Carlson was legally confined in the State of Vermont and is presently legally confined by federal authorities.

4. Denied except to admit that R. Kent Stoneman is Commissioner of Corrections. Sentence two is a conclusion of law and no answer need be made.

5. Denied except to admit that Paul Davallou is the present Superintendent of the Windsor State Correctional Facility.

6. Defendants admit that Julius V. Moeykens was the Supervising Officer at the Vermont State Correctional Facility, Windsor, on March, 14, 1974.

7. Defendants are without sufficient information and knowledge upon which to form an opinion as to the truths of the allegation.

8. Admitted.

9. Defendants deny the allegations except that Defendants are not with sufficient information to have a belief as to Plaintiff's feelings toward Defendant Moeykens.

10. Denied.

11. Denied.

12. Denied.

13. Admitted.

14. Defendants are without sufficient information and knowledge upon which to form an opinion as to the truth of the allegation except that Plaintiff was allowed to contact his attorney.

15. Admitted.

16. Defendants admit having held a hearing pursuant to Department policy which resulted in a "Notice of Decision."

Defendants also admit the last sentence of paragraph 16.

17. Admit and further states that Plaintiff was returned to Vermont to consult with counsel and entered pleas in the criminal cases.

18. Defendant is without sufficient knowledge and information upon which to form an opinion.

19. Denied.

20. Denied.

21. Denied.

22. Denied.

All other allegations not expressly admitted or denied are hereby denied.

THIRD DEFENSE

Further answering Plaintiff's Amended Complaint, Defendants set forth the following affirmative defenses:

1. The Defendants are protected by good faith immunity.

2. This case is now moot since the Plaintiff is no longer an inmate at the Federal Correctional institution at Lewisburg, but has been retransferred to another federal institution. It is obvious from Plaintiff's Amended Complaint that he delayed bringing this claim until long after he was transferred, and then only when he was retransferred in the federal system.

3. No claim of specific misconduct is made against Defendants.

4. The Plaintiff has failed to exhaust his administrative remedies.

5. Plaintiff has waived any violation of his Civil Rights by his failure to pursue available administrative remedies.

6. The doctrine of laches bars Plaintiff's claim and the relief he requests because of his failure to timely petition for relief.

7. Defendants had probable cause to take the actions ascribed to them and have always acted in conformity with the United States Constitution.

WHEREFORE, Defendants pray that Plaintiff's request for relief be denied and that his Amended Complaint be dismissed.

Dated at Montpelier, Vermont, this 16th day of December, 1974.

Respectfully submitted,

KIMBERLY B. CHENEY
Attorney General
State of Vermont

By:/s/ Alan W. Cook

ALAN W. COOK
Assistant Attorney General
Department of Corrections
State Office Building
Montpelier, Vermont 05602
828-2452

By:/s/ Robert L. Orleck

ROBERT L. ORLECK
Assistant Attorney General
Department of Corrections
State Office Building
Montpelier, Vermont 05602

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of December, 1974, I served a copy of the above Defendants' Answer to Amended Complaint with a copy of this Certificate appended thereto, on the Plaintiff in this matter by mailing a true conformed copy thereof to James R. Flett, Esq., Defender, Correctional Facilities, 43 State Street, Montpelier, Vermont 05602.

/s/ Robert L. Orleck
ROBERT L. ORLECK
Assistant Attorney General
Department of Corrections
State Office Building
Montpelier, Vermont

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON,

Plaintiff,

v.

R. KENT STONEMAN, Commissioner of
Corrections for the State of Vermont,

PAUL DAVALLOU, Warden, Vermont State
Penitentiary,

JULIUS V. MOEYKENS, Warden, Vermont
State Penitentiary,

THREE UNKNOWN CORRECTIONAL OFFICERS,
acting in their capacities as Correc-
tions Officers at the Vermont State
Penitentiary,

Defendants.

Civil Action File
No. 74-224

MEMORANDUM OF LAW

I. INTRODUCTION

On March 14, 1974, Plaintiff Wayne Carlson was transferred from the State Correctional Facility at Windsor to the Federal Prison at Lewisburg, Pennsylvania pursuant to an agreement between the State of Vermont and the United States Government.

In this action Plaintiff challenges the validity of that transfer on two grounds. The first ground is that he was not afforded due process of law as guaranteed by the Fourteenth Amendment. The second ground is that he was denied equal protection of the law as guaranteed by the Fourteenth Amendment because of the procedure used in his transfer.

The Vermont Department of Corrections decided to transfer Plaintiff on March 11, 1974, after he had violated a rule of the institution pertaining to escape or attempted escape. The decision was made by the Commissioner of Corrections and his deputy, and Defendant Moeykens was ordered to transfer Plaintiff. On March 12, 1974, Plaintiff was given written notice of the transfer prepared by Defendant Moeykens and informed of his opportunity for a meeting before Defendant Moeykens to convince Defendant Moeykens why Plaintiff should not be transferred.

Plaintiff contacted his attorney who advised him to sign nothing and request the attorney's presence at the meeting. The request for counsel was denied because of the label "administrative" on the meeting.

On March 13, 1974, a meeting was held between Plaintiff and Defendant Moeykens at which time because of pending or contemplated criminal charges, Plaintiff was not in a position to disclose or discuss the conclusions stated in the notice of transfer. No evidence was presented at this hearing, no one presented the Department of Corrections' or Windsor facility's claims, and no witnesses were presented by the Department or facility. The hearing officer was the warden of the facility, Defendant Moeykens. Later in the day on March 13, 1974, the Defendant Moeykens notified Plaintiff in writing that he was being transferred.

Plaintiff was incarcerated at Windsor in late May of 1973. Shortly thereafter he was subjected to a disciplinary proceeding and classification proceeding in which Defendant Moeykens took an

active part. Plaintiff testified that from that time until March 11, 1974, on several occasions he and Defendant Moeykens got into heated arguments. Plaintiff had several more disciplinary hearings and classification hearings the results of which Defendant Moeykens reviewed. Defendant Moeykens at all times had access to Plaintiff's files at the Windsor Correctional Facility. Defendant Moeykens testified against Plaintiff in a criminal action in late January of 1974.

Defendant Moeykens on at least three occasions was the complainant to the state's attorney concerning criminal charges against Plaintiff, and both Defendant Moeykens and Plaintiff testified that Defendant Moeykens assisted in returning Plaintiff to Windsor facility on March 11, 1974.

Testimony showed that on March 11, 1974, Plaintiff and Defendant Moeykens had a heated exchange in the punitive segregation area of the facility at which time Defendant Moeykens informed Plaintiff that he was being transferred to Lewisburg.

Defendant Moeykens testified that the hearing procedure used may have had little or no effect on the decision making process to transfer Plaintiff as the decision had already been made prior to the meeting between Plaintiff and Defendant Moeykens.

Plaintiff was transferred and remains in the federal prison system. He testified as to the changes in the conditions of confinement and losses he suffered as a result of the transfer.

Plaintiff maintains that the transfer was for violation of the institution's regulations. In fact, Anthony Tanzi who escaped

from the facility on March 11, 1974, with Plaintiff was afforded as a result of the same infraction, the disciplinary process stated in Plaintiff's exhibit No. 5 including legal counsel at the hearing.

Regardless of the label placed, the action taken by the Department of Corrections was for violation of rules and regulations, and Plaintiff was not afforded the same process that Mr. Tanzi was afforded.

II. STATUTORY SCHEME

Plaintiff was transferred to the federal prison system pursuant to State and Federal statutes. The Vermont statute is 28 V.S.A. §706 which reads as follows:

"The Commissioner [of Corrections] may enter into and execute a contract or contracts with the United States for the transfer of any inmate from any facility to a federal correctional facility when, in his opinion, the inmate needs particular treatment or special facilities available at the federal correctional facility."

The Federal statute is 18 U.S.C. §5003 which provides for contracts with the proper State official for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses.

The agreement between the State and Federal Government is Plaintiff's exhibit No. 4.

In February of 1973 the Vermont Department of Corrections implemented a state-wide policy for out-of-state transfers. This policy, a Defense exhibit, provided for a limited procedure for the state to use to provide the person to be transferred an opportunity to overcome the prior decision to transfer that person.

Plaintiff submits this procedure did not afford him procedural due process and denied him equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

III. INVOLUNTARY INTERSTATE TRANSFERS OF
PRISONERS REQUIRE A PRIOR HEARING

The question of whether or not the involuntary interstate transfer of an inmate results in a grievous loss or substantial change in the conditions of confinement has been quite extensively litigated.

A leading case in the area of interstate transfer is Gomes v. Travisono, 490 F.2d 1209 (1st. Cir. 1973) judgment vacated and remanded to the Court of Appeals for the First Circuit "for further consideration in light of Wolff v. McDonnell, 418 U.S. ____ U.S. ____ (1974)." 15 Cr.L.Rptr. 4098 (1974).

In Gomes the Circuit Court in discussing the effect of an interstate transfer on the inmate found that:

"Wholly apart from the specifics of this case, we think it well recognized that transfer characteristically entails inconveniences and privations. Summarized by the distance factor alone, increasing the difficulty of communication and visitation. See Capitan v. Culp, 356 F.Supp. 302 (D. Or. 1972). Other disadvantages stem from the breaking off of established programs, both educational and rehabilitative, and orientation to a new setting, programs, rules, and companions. Still other privations exist by reason of the administrative requirements of the receiving prison. New inmates must often be subject to 'administrative' isolation pending examination, classification, and integration into a new prison community. Although the reason for the segregation may be distinguished from the reason for punitive segregation, the impact upon the inmate is not less. Finally, if the fact of transfer noted on an inmate's record without further explanation connotes 'troublemaker,' the inmate may be faced with recurrent, unfavorable dispositions as to the status within the prison and might eventually suffer an

unfavorable parole decision, resulting in a longer term
adverse alteration of the inmate's living conditions."

Page 1213

Other cases that have determined a hearing is mandated because of the loss or potential loss suffered by the transferred inmate include Hoitt v. Vitek, 361 F.Supp. 1238 (D.N.H. 1973); Ault v. Holmes, ____ F.2d. ____ (6th Cir. 1974) affirming the lower court decision at 369 F.Supp. 288 (W.D.Ky. 1973); Croom v. Manson, 367 F.Supp. 586 (D.Conn. 1973); Barrett v. Boone, ____ F.Supp. ____ (D.Mass. 1973); Capitan v. Culp, 356 F.Supp. 302 (D.Or. 1973); Kessler v. Culp, ____ F.Supp. ____ (D.Or. 1973).

In another series of decisions, involuntary transfers of inmates from one prison setting to another have been considered sufficient loss to the inmate to require prior hearings. These cases include Newkirk v. Butler, (intrastate transfer) 407 F.2d 1214 (2nd Cir. 1974); Bowers v. Smith (intraprison transfer), 353 F.Supp. 1339 (D.Vt. 1972); Park v. Thompson (intrastate transfer), ____ F.Supp. ____ (D.Ha. 1973); Aikens v. Lash (intrastate transfer), 371 F.Supp. 482 (N.D.Ind. 1974); Stone v. Egeler (intrastate transfer), 377 F.Supp. 115 (W.D. Mich. 1973); Landman v. Royster (intraprison transfer), 333 F.Supp. 621 (E.D.Virg. 1971); Haymes v. Montanye (intrastate transfer), 360 F.Supp. 64 (S.D.Ia. 1973); Burchitt v. Bower (intrastate--mental hospital to prison transfer), 355 F.Supp. 1278 (D.Ariz. 1973).

The Vermont Department of Corrections prior to Plaintiff's transfer and as a result of a suit filed before this Court, had agreed that a hearing should be afforded prior to an interstate

transfer. (Defendants' exhibit of policy, Bousley v. Stoneman, Docket No. 6679, Order dated June 11, 1973, Coffrin J. presiding.)

In the case at bar Plaintiff has testified he suffered loss of visits, has been labeled a "stool pigeon" in the federal system solely because he is a state prisoner in the federal system, suffered the loss of personal property, was denied access to his attorney representing him on pending criminal charges at the time of transfer, was subjected per agreement to all provisions of law and regulations applicable to persons committed for violations of laws of the United States, including but not limited to more restrictive telephone and mail regulations than he was afforded at the Vermont facility at Windsor, was placed in administrative segregation at Lewisburg, Terre Haute, and Marion Federal Prisons as a result of transfers, was subjected to repeated classification proceedings which were held without the benefit of correct information concerning his incarceration or sentence in Vermont, has not seen or had access to the Parole Board since being transferred from Vermont, and has required protective custody in the federal system because of allegations that as a state prisoner in the federal system he was an informer.

It is submitted that Plaintiff has suffered grievous loss as a result of the transfer, and other courts have so concluded that every prisoner transferred suffers grievous loss.

It is clear that this Court, the Vermont Department of Corrections and authoritative case law conclude that an inmate suffers a grievous loss and/or a substantial change in the conditions of confinement so as to be entitled to a hearing prior to transfer.

IV. THE PROCEEDING AFFORDED PLAINTIFF DID NOT
MEET DUE PROCESS STANDARDS

In June of 1974 the United States Supreme Court in Wolff v. McDonnell, ____ U.S. ____ 42 Law Week 5190 (1974) held that certain procedures had to be provided if the minimum requirements of procedural due process were to be satisfied in a situation where a substantial change in the conditions of confinement of an inmate may result. After Wolff, Gomes v. Travisono, supra, was vacated to be considered in light of Wolff. Wolff held that the following procedure must be afforded:

1. "We hold that written notice of the charges must be given to the disciplinary action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee." Page 5198.

2. "We also hold that there must be a 'written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action.' Morrissey v. Brewer, 408 U.S. 471 (1974) at 489." Page 5198.

3. "We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." Page 5198.

The Court goes on to describe the reasons why it felt there should be a limit on witnesses that could be called by the accused at pages 5198 - 5199:

4. The Court declines to require confrontation and cross-examination of those furnishing evidence against the individual as a matter of course. "We think that the constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination The better the course at this time, in a period where

prisons practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." Page 5199.

5. After discussing counsel, both lay and legal, the Court states that: "At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings." Page 5200. The Court also goes on to hold that lay counsel may not be required.

6. "Finally we decline to rule that the Adjustment Committee which conducts the required hearings at the Nebraska Prison Complex and determines whether to revoke good time is not sufficiently impartial to satisfy the Due Process Clause." Page 5200.

Justice Marshall in his dissent more fully discusses the requirement of the impartial hearing officer and states at page 5209:

"Finally the Court addresses the question of the need for an impartial tribunal to hear these prison disciplinary cases. We have recognized that an impartial decision maker is a fundamental requirement of due process in a variety of relevant situations; see, e.g., Morrissey v. Brewer, supra, 408 U.S. at 485-486; Goldberg v. Kelly, supra, 397 U.S. at 271, and I would hold this requirement fully applicable here. But in my view there is no constitutional impediment to a disciplinary board comprised of responsible prison officials like those on the Adjustment Committee here. While it might well be desirable to have persons from outside the prison system sitting on disciplinary panels, so as to eliminate any possibility that subtle institutional pressures may affect the outcome of disciplinary cases and to avoid any appearance of unfairness, in my view due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case.... I find it impossible to determine on the present record whether this standard of impartiality has been met, and I would leave this question open for the District Court's consideration on remand." Page 5209.

As stated earlier by the Supreme Court in Wolff, the standards out there are the minimum standards that would meet due process safeguards.

Vermont practice regarding disciplinary hearings at the time of the transfer of Plaintiff had developed into procedures which

provided substantially more than Wolff required as far as minimum due process safeguards. 28 V.S.A. §852 since amended, stated as follows:

"(a) The supervising officer of each facility shall appoint a disciplinary committee where appropriate from among the staff of the facility. The supervising officer may designate himself or a subordinate as chairman of the committee.

"(b) Prior to any disciplinary action, or within 72 hours thereafter, if the action includes a change in the place of confinement of the inmate within the facility, the disciplinary committee shall conduct a factfinding hearing pursuant to the following procedure:

(1) Notice of the charge and of the hearing shall be given to the inmate so charged;

(2) The inmate shall have an opportunity to confront the person bringing the charge, to call witnesses, to present evidence and to call upon any officer or employee of the facility who may desire to assist him in the preparation and presentation of his case before the committee.

"(c) The committee shall recommend to the supervising officer an appropriate disposition of the matter subject to the provisions of this subchapter."

The regulations for disciplinary proceedings at the Windsor Prison in effect at the time of the transfer of Plaintiff are listed in Plaintiff's exhibit No. 5. It should be emphasized that Rule 10 E provides for legal counsel if the inmate is charged with a violation which has been referred for criminal prosecution as in the case at bar.

It is submitted that Vermont prior to the decision in Wolff, by court decision, administrative regulation and statute had determined that a higher degree of due process than those minimal standards established in Wolff would be afforded to a person subject

to disciplinary proceedings. Plaintiff in this case certainly would be entitled to the same procedures provided to somebody facing discipline in the facility.

The District Court in Vermont in the case of Bowers v. Smith, supra, was faced with the question of what due process safeguards would be afforded in an intraprison transfer. Judge Holden held that the following due process requirements must apply:

"Their right to a hearing shall include notice of the charges against them, a fair and impartial determination, and the opportunity to call witness, and cross-examine witnesses. Each prisoner shall have the assistance of staff or lay counsel at the hearing, and a record of the testimony shall be kept." Page 1346.

Recently the Second Circuit in Newkirk v. Butler, supra, was faced with the issue of what type of due process should be afforded a prisoner who was transferred involuntarily from a medium security to a maximum security prison within a state. In deciding the question, the Court made several observations that are applicable to the case at hand. First of all, Plaintiff in the case at bar was informed by Defendant Moeykens that the hearing was "administrative" and not a disciplinary hearing which apparently precluded the Plaintiff from asserting rights normally afforded a prisoner faced with a substantial change in the conditions of confinement in the Windsor Prison. The Court in Newkirk stated as follows:

"Classification by label (e.g. as administrative or disciplinary) may facilitate prison administration but it cannot be used as a substitute for due process. In our view appellee's position gives insufficient consideration to the very real loss an inmate may suffer even when his transfer is not part of formal disciplinary proceedings and has no adverse parole consequences. It also overlooks the danger that a transfer, when based on rumor or 'confidential information' about an inmate's behavior, past or planned,

may be arbitrary and unjustified by the facts. These factors, the adverse consequences to the prisoner and the chances of error, are the principal elements to be considered in determining what process is due the transferred prisoner, rather than the label put on the transfer. When the prisoner suffers substantial loss as a result of the transfer, he is entitled to the basic elements of rudimentary due process, i.e., notice and an opportunity to be heard."

Page 1217.

The Circuit Court in upholding most the District Court's decision held that the inmate was entitled to a hearing at which he was informed of the charges against him and afforded an opportunity to explain his behavior before a relatively impartial tribunal either prior to the transfer or if prompt action is essential, as soon thereafter as practical.

Newkirk along with Bowers seems to be quite clear that an impartial hearing body is required to meet the requirements of due process in the state of Vermont.

It would appear that the Department of Corrections in establishing their transfer policy, submitted as a Defendant exhibit, relied heavily on the Gomes v. Travisono, supra, decision for the type of hearing that an inmate should be afforded prior to interstate transfer. It should be first of all noted that this decision has been vacated in light of Wolff v. McDonnell as far as establishing the minimum due process that should be afforded. As far as the decision regarding the impartiality of the decision maker, the Court stated in Gomes:

"While absolute impartiality is the ideal, we see difficulty in requiring this in the type of transfer case we are dealing with for having separated out the kind of cases where charges of misconduct are being pressed against the inmate and where it is most inappropriate that the prosecutor

and decider be the same person, we are left with matters where the superintendent or warden is necessarily vested with wide discretion." Page 1216.

It is submitted in the case at bar that Plaintiff was in fact being transferred because charges of misconduct were pressed against him.

The Court went on to state at page 1216:

"With these admittedly limiting strictures, we leave to the District Court the fashioning of a transfer hearing tribunal which can aspire to reasonable objectivity while recognizing a responsibility and wide discretion of the warden or superintendent."

Applying any standard that has been used to date to determine what process is due a prisoner faced with a transfer, practically all of the decisions require an impartial hearing officer or board. Vermont, in other situations dealing with the disciplining of an inmate, provides quite extensive hearings as a result of the Bowers decision and statutory and administrative language.

It is submitted that Plaintiff in this case was transferred because of his violation of prison regulations and as such was entitled to the protection of the procedures afforded by statute, regulation and the Bowers decision.

A recent case that Defendants rely on is Haymes v. Montanye, supra, where an inmate was transferred from one maximum security facility in New York to another maximum security facility in New York. The District Court summarily dismissed the complaint, and the Circuit Court reversed stating:

"Transfer intended as punishment, however, presents a situation wholly different from the administrative removal of an inmate to another facility. When harsh treatment is meted out to reprimand, deter, or reform an individual,

elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling. While some discretion may be appropriate in an administrative determination of the need to avoid violence and unrest, the specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior, and to assess the effect which transfer will have on the inmate's future incarceration." Page 2058.

The Court goes on to say:

"The facts of this case may provide a good illustration of the real hardship in being shuttled from one institution to another. After being sent to Clinton, Haymes found himself several hundred miles away from his home and family in Buffalo, New York. Not only was he effectively separated by the transfer from his only contact with the world outside the prison, but he also was removed from the friends he had made among the inmates at Attica and forced to adjust to a new environment where he may well have been regarded as a troublemaker. Contacts with counsel would necessarily have been more difficult. A transferee suffers other consequences as well: the inmate is frequently put in administrative segregation upon arrival at the new facility,..... personal belongings are often lost; he may be deprived of facilities and medications for psychiatric and medical treatment,.... and educational and rehabilitative programs can be interrupted. Moreover, the fact of transfer and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom. One can easily comprehend the bitterness which may be engendered by the capricious infliction of such unwarranted sanctions. Small wonder, then, that the American Correctional Association has recognized that '[i]n any penal system embracing several institutions, transfer from one to another is often an effective disciplinary procedure as well as an administrative necessity.' American Correctional Ass'n, Manual of Correctional Standards 416 (1972)." Page 2058.

Plaintiff asserts that in light of Wolff, supra, Bowers, supra, and 28 V.S.A. §852, since amended, and the administrative disciplinary rules at Windsor State Prison, notice was not sufficient to allow him to adequately prepare his defense. Plaintiff also asserts that notice was too short to prepare his defense.

Plaintiff asserts that he should have had the evidence presented against him, and that he be afforded legal counsel and a reasonable opportunity to call witnesses and to confront and cross-examine adverse witnesses.

Plaintiff was entitled to a neutral and impartial hearing officer and findings and a decision based on the evidence presented at the hearing.

Defendants failed to afford Plaintiff these safeguards.

V. DEFENDANTS' DENIAL OF THE RIGHT TO LEGAL COUNSEL AND
A HEARING BEFORE AN IMPARTIAL HEARING OFFICER
DENIED PLAINTIFF EQUAL PROTECTION OF THE LAW

It is now undisputed that prisoners retain protections afforded by the Fourteenth Amendment to the United States Constitution.

"But though his rights may be diminished by the needs and exigencies of the constitutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the constitution and the prisoners of this country." Wolff v. McDonnell, ____ U.S. ____, 42 Law Week 5190, 5195 (1974).

One of the fundamental principles derived from the Equal Protection Clause of the Fourteenth Amendment is that the State, having once afforded to its citizens a legal protection through statute or administrative policy, may not then deny that protection to some of those citizens absent a compelling, or at least legitimate, state interest. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. p. 14, 9 L.Ed2d 811 (1963).

At the time of Plaintiff's transfer, the Vermont Department of Corrections had a policy of providing legal counsel and an independent hearing officer to insure protection of the rights of those prisoners whose disciplinary hearings involved alleged activity which could be the subject of criminal charges brought by the State (See Plaintiff's Exhibit No. 5, §10 E, and testimony of Defendant Moeykens). In disciplinary hearings where no criminal charges were contemplated legal counsel was not permitted, and the hearing officer or officers were prison personnel. (The independent hearing officer was at that time, and remains today, a former warden of the State Prison).

Plaintiff's transfer hearing was held as a result of his third escape from Windsor Prison, and Defendant Moeykens had, immediately after the escape and two days before the hearing, telephoned the local state's attorney to report the alleged escape. Criminal charges were eventually pursued and resulted in conviction. (See testimony of Defendant Moeykens). Nevertheless, Plaintiff requested and was denied by Defendant Moeykens the right to be represented at the hearing by legal counsel. In addition, not only did Defendant Moeykens fail to provide Plaintiff with an independent hearing officer, he himself served as the hearing officer, even though he had already been instructed by Defendant Stoneman to transfer Plaintiff and had, in fact, commenced arrangements for the transfer. (See testimony of Defendant Moeykens and Plaintiff Carlson). Finally, Plaintiff's co-defendant Anthony Tanzi, was in fact given a hearing in which he was permitted legal counsel and an impartial hearing officer. (See testimony of Witness Tanzi).

Since no emergency was alleged by Defendants, the only conceivable reason for discriminating against Plaintiff in this manner is that the result of his hearing was to involve transfer to the federal prison system, rather than discipline within the Vermont prison system. But Plaintiff has argued, *supra*, that where there is a grievous loss, the label given the hearing cannot limit the amount of due process which must be afforded. Furthermore, the rationale behind the Corrections Department policy under discussion does not involve the potential disposition of the hearing; rather it involves the commendable concern on the part of prison officials that, because of the potential criminal charges, the risk to the prisoner is sufficiently great as to require the added protection of legal counsel and an independent hearing officer. Thus, it makes no rational difference whether the hearing is called "disciplinary" or "transfer," "punitive" or administrative," or whatever. It is still pure discrimination, and denial of equal protection, to treat Plaintiff differently from all other inmates similarly situated.

Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); Washington v. Lea, 263, F.Supp. 327 (M.D. Ala. 1966), aff'd. mem. sub. nom, Lea v. Washington, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968); Jackson v. Godwin, 400 F.2d. 529 (5th Cir. 1968).

VI. CONCLUSION

In conclusion, Plaintiff reiterates that he was not afforded his rights as guaranteed by the Fourteenth Amendment because of the hearing afforded; and as a result of the deficient procedure, could not have been legally transferred outside the State of Vermont.

Respectfully submitted this 23rd day of December 1974 at
Montpelier, Vermont.

/s/ James R. Flett
JAMES R. FLETT
Defender, Correctional Facilities
Attorney for Plaintiff
43 State Street
Montpelier, VT 05602

/s/ Andrew B. Crane
ANDREW B. CRANE
Office of the
Defender, Correctional Facilities
Attorney for Plaintiff
43 State Street
Montpelier, VT 05602

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of December, 1974,
I served a copy of the above Plaintiff's Memorandum of Law with a
copy of this Certificate appended thereto on the Defendants in
this matter by mailing a true conformed copy thereof first class,
postage prepaid to Alan W. Cook, Assistant Attorney General,
Department of Corrections, Montpelier, Vermont 05602.

/s/ James R. Flett
JAMES R. FLETT
Defender, Correctional Facilities
Attorney for Plaintiff
Montpelier, VT 05602

/s/ Andrew B. Crane
ANDREW B. CRANE
Office of the
Defender, Correctional Facilities
Attorney for Plaintiff
Montpelier, VT 05602

Office of the
DEFENDER
GENERAL
Montpelier,
Vermont 05602
802-828-3168

RECEIVED March 12, 1974

Mar 13 8:47 AM '74

DEPARTMENT OF
CORRECTIONS

PLAINTIFF'S
EXHIBIT

To: Wayne Carlson

From: Julius V. Moeykens

This is to confirm the oral notification I gave you on the evening of March 11, 1974 that we propose to transfer you to the Federal Penitentiary at Lewisburg, Pennsylvania on March 13th. or March 14th., 1974, under the terms of the agreement between the State of Vermont and the United States.

This transfer is proposed for the following reason.

Your repeated escapes and the violent nature of those escapes renders all Vermont facilities unsuitable because there are no adequate treatment and rehabilitative programs available for an individual with the level of security you require.

A hearing on the proposed transfer will take place on March 13th., 1974, at 8:30 a.m., before me.

At the hearing, you may call relevant witnesses who are available, make any statements you wish, ask any questions that are relevant and be assisted by a staff member of your choice, if I determine he is reasonably available.

You should indicate at the bottom of this notice the names of any witnesses you desire to have present at the hearing and the name of the staff member, if any, you desire to assist you, not later than 12:00 noon today. An additional copy of this notice is being provided to you, in order that you may retain one copy to prepare and for your records.

If you do not wish to have a hearing on the reasons for your proposed transfer, you may so indicate by signing the waiver provided below.

J. V. Moeykens
J. V. Moeykens
Supervising Officer

I do hereby waive a hearing on my proposed transfer.

Wayne Carlson

Date: _____

Witness: _____

March 12, 1974

I do not waive a hearing on my proposed transfer and request
that _____ be made available to assist me

^(staff member)
at the hearing. I also desire that the following witnesses be
present at the hearing:

Wayne Carlson

Date: _____

Witness: _____



Moeykens: I have a cold, and I am hoarse so I am going to try to speak slowly and get the sounds out. If my voice fails completely I will have to use Doc Hall; I will have to whisper to him; he will have to be my voice. So to begin with for the record this is March 13; it is now 8:42. Present in this room is myself, Julius V. Moeykens, Wayne Lorne Carlson and Dr. N. Hall and Maurice Lemere and William Bateman. This is a hearing before me, Wayne, and the issue here is an opportunity for you, if you want a hearing, to convince me or to make statement in any direction that will persuade me not to transfer you to the federal penitentiary at Lewisburg, Pennsylvania. And just to review a moment, on Monday evening March 11, I verbally informed you of the intent and proposal of the State of Vermont, Department of Corrections to transfer you to Lewisburg, and I advised you that there would be a hearing today before me in this matter and that you would have an opportunity to waive the hearing, if you so desired and if you wanted a hearing then you would have an opportunity to call reasonable witnesses that might be available and also to have a staff person assist you and help you at this hearing. Then, on Tuesday, March 12th, I furnished you with a copy of this material in writing confirming what I had told you on Monday evening and at that time I asked if you would; two choices, if you wanted to waive this hearing before me you could sign the statement that you waived the hearing and date it, or if you desired a hearing to sign the statement that you desired this hearing; and if you wanted

somebody here with you from the staff to indicate. Also if you wanted witnesses present of your choice, you were to indicate these in writing to me. All this to be done before noon on the 12th. To my knowledge you did not advise me of anything before noon yesterday the 12th, and I see from the piece of paper you have still with you that I don't believe or did you sign this actually-- no you didn't sign either place whether you waive a hearing or want a hearing, but for the record, Wayne, what is your position in the matter now. I still ask you if you want me; do you want to proceed with explanations as to why I shouldn't transfer you, or do you just want to waive all that and just you know accept the transfer.

Carlson: No, I've discussed this with my lawyer, Mr. Kyle and he has instructed me not to sign anything, and request his presence at any hearing. And I do that now. I request that this committee allow me to have my lawyer present.

Moeykens: First of all, it is not a committee. This man is here as my voice. If it hadn't been for the way I am today, he wouldn't be here. I would have just been taping the proceedings, or else I would have had a secretary taking the notes of the hearing. This is a hearing just between you and I--I'm the hearing officer, and this is just between you and I; there is no committee. These two gentlemen are in the room because they are your custodial-- they are custodial officers who brought you here to this hearing room and at my request, they are in this room, but they are not part of this, so there isn't any committee. Secondly, on your request to have your attorney present at the hearing before me that request is

denied on the basis that this ^{is} simply an administrative hearing--it is before me to give you an opportunity to make a statement or describe to me why I shouldn't proceed in transferring you to the federal penitentiary.

Carlson: O.k. I would say this. I would say this. Number one, with the two custodial officers in the room. I don't believe you need two custodial officers in this room with me. Any time you talk to me; any violence would do/or attempt to escape alleged never at any time did I commit violence against any officer simply for the sake of committing violence. Not at any time have I done that. I want that put on the record. Not at any time did I ever injure one of your officers; perhaps the threat of violence was there just by my face the threat of violence was there. But at any time no violence was committed.

Moeykens: What about a knife.

Carlson: I may very well be charged in state court with offenses so I can't hardly say anything like that especially on the tape recorder.

Moeykens: All right. What you are doing now is getting off the track of what the purpose of this hearing is.

Carlson: No. You said, you said at the hearing you may ask relevant questions, relevant witnesses who are available, make any statement you wish, ask any questions which are relevant, be assisted by a staff member of your choice if I determine if he is reasonably available. I don't have a staff member here. You just finished telling me, Mr. Moeykens, that it is a hearing between you and I.

Moeykens: That's right.

Carlson: You wish to transfer me, and I don't wish to be transferred.

Moeykens: O.k. Tell me why you don't wish to be transferred. I think that's important. First of all, you realize to this point I don't even have to hold a hearing because the fact that you didn't sign for or against is an indication to me that you didn't want to have a hearing. You didn't fulfill the request that I made.

Carlson: I'll explain that.

Moeykens: You sign, you know, that you wanted a hearing.

Carlson: I'll explain that this way. If there were three signatures here where I could place my signature after each individual sentence. For instance, I do not waive a hearing on proposed transfer. I would have signed that. However, if I signed this what I in effect sign is I do not waive a hearing on the proposed transfer and request that such a staff member be made available to assist me at the hearing. I also desire the following witness be present. In effect, I'm signing three different individual questions there. O.k. What I would sign is--I do not waive a hearing on my proposed transfer. I would sign that. And request that--I would not sign and request that a staff member be made available to me because simply because my lawyer has instructed me that I should that I should ask that he be present. What I am saying is that if I place my signature on this paper I am signing too many agreements. I'm not signing one single agreement and do not waive the hearing. I would--you asked for reasons. I don't know. I'm not aware of what my status is right now in state court. I do know I have an appeal pending.

My lawyer has instructed me that with this appeal that it is in my best interest to stay here in this state, and he instructed me yesterday that he would protest any transfer to any other institution simply because of the appeal. I have. I was supposed to be in state court sometime this week on another charge. My lawyer has a motion before the court--White River Junction. Whether or not there will be state charges in this alleged incident I don't know; I don't know that yet, and all I can say is that I don't know what my status is.

Moeykens: I don't know either.

Carlson: I would say this.

Dr. Hall: Could I, as Mr. Moeykens' voice, ask one question, Wayne.

Carlson: Yes.

Dr. Hall: Would you object to transfer to a federal penitentiary or other incarceration other than here.

Carlson: I would not object; I would not object to be turning over to the Canadian authorities. I have a deportation order in against me.

Dr. Hall: I realize that.

Carlson: It is simply a matter to transfer me to a federal institution would be to federal authorities for safekeeping I could just as easily be transferred or turned over to the immigration authorities who would transfer me to Canada, and I have charges there, and I have a sentence there to serve.

Dr. Hall: I see. Well, this is what I would like to try and get on the record, and try and understand is that I think all Mr. Moeykens was asking and what this discussion is about is that your possible transfer to a U.S. federal penitentiary. Now--

Moeykens: It isn't that at all, Doc.

Dr. Hall: Oh! I'm sorry.

Moeykens: The issue is it is a fact that the State of Vermont is going to transfer him to the U.S. federal penitentiary at Lewisburg unless he can convince me today at this hearing that he shouldn't be transferred and that is the whole case--the whole issue.

Carlson: What I am having trouble with is this convincing part. Now, I'm not quite sure of what you mean, Mr. Moeykens when you say convince me.. Like what--o.k. you want a statement--you want me to state for you man to man Mr. Moeykens I will not escape again. If I say to you now; I say to you, Mr. Moeykens, I will not escape again or attempt to escape from this institution--would you consider that.

Moeykens: Let's look at the reason here. It's the reason for this transfer is your repeated escapes and the violent nature of those escapes renders all Vermont facilities unsuitable because there are no adequate treatment and rehabilitative programs available for an individual with the level of security you require. That's it in the nutshell. So I guess your position has to be on that reason alone you have to be able to say to me Wayne here are my reasons why you shouldn't--the state's got there; here are mine. I have to--

whatever comes out after this hearing--I have to give it to you in writing you know what the conclusions of this hearing up to this point we're still; it's up for you to say verbally to me now yes I don't waive my right to hearing; that is what you said on tape in which you really said I don't want to sign the other parts of this statement.

Is that--

Carlson: I said--what I'm saying is this. That I'm under the impression--to me this is a confusing document for two reasons. One is the signature on the front is required by me--I do hereby waive a hearing on my proposed transfer; if I don't waive the hearing, it seems to me I am entitled, more or less as a right, to have a hearing. On this side I do not waive a hearing. Well, obviously I'm confused as to why I should have to sign I do not waive a hearing because if I sign here that means I want a hearing. If I don't sign the other side, that means I want a hearing.

Moeykens: I guess actually--I think I can understand your confusion. And I think you are right in how you express it; there is confusion. Basically, it really means that if there is someone around who doesn't want a hearing at all on these things, then he signs it because he doesn't want it. O.k.

Carlson: I'm in a position; I'll state my position; I'm under deportation to Canada as of September 13.

Moeykens: Yes, but that's--there's ramifications there.

Carlson: Ramifications there--fine. However, my position does not change. Regardless of the ramifications, I would protest any transfer to any federal institution, to any institution outside the state.

Moeykens: Your deportation order to Canada will still stand whether it's a year from now or 10 years from now. The order was made. When you reach a point in time when you are free from bondage in the State of Vermont, then the deportation order will be carried out.

Carlson: I'm aware of that. I'm aware of that. It is simply this. How long does the state wish to keep me?

Moeykens: I can't answer that question, but based upon your sentence unless there are changes of your present sentence you have a minimum of six years and a maximum of 12; when you add these two together. So looking at it from just that end of it, a man usually serves 2/3rds of his minimum before he is eligible for parole.

Carlson: Right. Exactly. There is not too much I can say other than this. I would like--will my attorney be allowed to be present at a hearing.

Moeykens: I've already answered that question, and it is no.

Carlson: I would request lay counsel; is that possible?

Moeykens: It's too late now.

Carlson: William Mayer?

Moeykens: No.

Carlson: That's not possible.

Moeykens: No. You see it's too late now. You were supposed to notify me by noon yesterday; I gave it to you in writing; you failed to notify me yesterday by noon.

Carlson: The reason for not giving you any notification whatsoever is simply because my attorney instructed me not to sign

9.

any document; in effect, not to agree to any hearing before you without his presence, and should I have submitted a list of witnesses to you I am in effect agreeing with the hearing.

Moeykens: As far as I am concerned, we have already been having a hearing. It has been going on for almost 20 minutes now. You and I talking together is a hearing. Despite whatever counsel you received, we have been holding a hearing. You have made a statement; you made a statement to me as to why you don't want the State of Vermont to transfer you out of state, and I've got that statement unless you have any other statement to make.

Carlson: No.

Moeykens: The only other reason--

Carlson: My only statement I can make in that case is that I object to the hearing, and I want my counsel present. Other than that, there is not too much else I can say.

Moeykens: You still refuse to sign this form, do you?

Carlson: On the advise of my--

Moeykens: That says you want a hearing--

Carlson: On the advise of my counsel, I just can't put my signature to this.

Moeykens: O.k. I guess then unless there is something else I guess this hearing is over. You made your statement, and then you will receive from me today the results in writing of this hearing here today.

Carlson: Could I ask you; could I ask you what procedure do you, as head of this institution, have to follow to transfer me to Lewisburg, Pennsylvania?

Moeykens: Put you in a car and transport you.

Carlson: This obviously would have to be warrants of committal, and who signs the warrants of committal from this state to Lewisburg?

Moeykens: I suggest you look under Title 28 V.S.A. 706 which governs the transfer to federal prisons. You see I can as far as the legality of sending you somewhere it's legal, and I don't think I need to say any more.

Carlson: No. No. Well, I would protest any transfer; any transfer that takes place I strongly protest.

Moeykens: O.k. Fine. You have that in writing. It is now one minute after nine, and this hearing is terminated.

CERTIFICATE OF SERVICE

I hereby certify that I have examined the attached transcript of hearing held before me on March 13, 1974 at 8:42 a.m. at the State of Vermont Correctional Facility - Windsor, Vermont, involving the proposed transfer of Wayne L. Carlson to the federal penitentiary at Lewisburg, Pennsylvania. This transcript is a true copy of the tape recording of those proceedings.

Dated at Montpelier, Vermont, this 1st day of November, 1974.

Julius V. Moeykens
JULIUS V. MOEYKENS

TO: Wayne Lorne Carlson, aka Joseph Dalton; (Gerald) Boyko
FROM: J.V. Moeykens, Supervising Officer, State Correctional Facility
Windsor, Vt.

DEPARTMENT OF
CORRECTIONS

NOTICE OF DECISION

Pursuant to the notice given to you orally on March 11, 1974 and in writing on March 12, 1974, a hearing was held before me on March 13, 1974. At that time I informed you again of the reason of your proposed transfer that is, your repeated escapes and the violent nature of these escapes renders all Vermont facilities unsuitable because there are no adequate treatment and rehabilitative programs available for any individual with the level of security you require.

Your last two escapes have been from the most secure general housing area of this maximum security facility. Both have involved assaults. Your most recent escape on March 11, 1974 involved especially dangerous conduct. It is apparent that we do not have facilities in Vermont capable of programming you on a long term basis.

At the hearing on your proposed transfer you elected not to have the assistance of a staff officer and you refused to sign the prepared form indicating your desire to have this assistance. Instead you requested the assistance of another inmate, namely, William Mayer and this was denied since you had been given your options in writing and it did not include the option of another inmate helping you. You further requested the presence of your attorney at this hearing and this was denied on the grounds that this was an Administrative hearing provided for you before the Supervising Officer and further that this was not an option indicated in writing to you. You also elected not to call any witnesses in your behalf. You refused again to sign the typed form furnished by me requesting this hearing or waiving this hearing and despite your non-signature I provided you with a hearing.

I have considered the matters you have raised at the hearing, specifically:

- (1) that you were advised by your lawyer not to sign anything.
- (2) that you requested on your attorney's advice to have him present at this hearing.
- (3) that you objected to the presence of two correctional officers in the hearing room.
- (4) that you refused to accept any transfer to a federal penitentiary since you have an appeal pending and according to your attorney's advice it would not be in your best interest to be transferred out of state at this time.

TO: Wayne Lorne Carlson, aka Joseph Dalton; Gerald Boyko
FROM: J.V. Moeykens, Supervising Officer, State Correctional Facility
Windsor, Vt.

PAGE 2 NOTICE OF DECISION CONTD.

(5) However, you did say for the record that you would not refuse immediate deportation to the Canadian authorities.

It seems to me that some ambiguity exists since on one hand you refuse a transfer to a federal penitentiary because of appeals pending in Vermont courts and on the other hand you state that you will accept an immediate deportation to the Canadian authorities.

However, the security factors present in any attempt to program you any longer in Vermont outweigh the considerations you presented. Therefore, my decision is that you will be transferred forthwith to the federal penitentiary at Lewisburg, Pennsylvania.

J.V. Moeykens
J.V. Moeykens, Supervising Officer
March 13, 1974

JVM:ebd

cc RKS ✓

You are subject to search at any time and any contraband found in your possession will be confiscated.



DISCIPLINARY PROCEDURES

These steps will be followed whenever you are disciplined:

1. Should your offense be a minor one you may receive advice and correction from an officer. Should it be more serious or occur again, you may receive a written "reprimand". You will be given a copy of the reprimand. You will receive a Disciplinary Report, commonly known as a "white ticket", if you accumulate three or more reprimands during a four month period, or for a major violation of a rule or regulation of this Facility.

2. An employee charging you with a major violation shall complete a Disciplinary Report Form (white ticket) which shall include:

- A. Name of reporting officer.
- B. Time, date and place of violation.
- C. A detailed account of the alleged offense including names of witnesses, etc.

3. A copy of the report will be submitted to an investigating officer who shall be an officer permanently designated by the Supervising Officer. The investigation officer shall immediately review and investigate the matter as to completeness, accuracy, and possible mitigating circumstances. He may take the following action:

- A. Reduce the charge to a reprimand and notify the reporting officer and resident.
- B. Dismiss the charge, and notify the reporting officer and resident.
- C. Dismiss the charge on the condition that the resident be seen by his counselor or another member of the staff.
- D. Bring the resident before the Disciplinary Committee and press charges.

4. If the investigating officer presses charges, he will provide you with a copy of the disciplinary report. The report will include the date of the hearing. He will also obtain from you a list of any witnesses you may call at the hearing and determine if you wish to be represented.

5. It shall be the responsibility of the investigating officer to prepare and present evidence on behalf of the Facility.

6. At your request you may be represented before the Disciplinary Committee by your counselor or other Facility Personnel, but not legal counsel. Such lay counsel shall be given sufficient time from his regular duties at the Facility to assist you in preparing for the hearing.

7. The Disciplinary Committee shall consist of three impartial members, including a permanent Chairman appointed by the Supervising Officer.

8. No person who was directly involved in the incident or who prepared the formal charge shall sit on the Disciplinary Committee.

9. The hearing shall be held within seven days of receipt of the report unless the resident or Facility requests a continuance not to exceed an additional seven days for further preparation or other good cause. After the first continuance the resident or Facility may request one additional continuance, not to exceed seven more days, if the original continuance was at the request of the other party. If either party is granted a continuance by the Chairman, the other party will be so notified. Each party will be notified of the new hearing date as soon as possible.

10. You will have the opportunity to:

A. Be present at the hearing.

B. Confront and question all persons called as witnesses.

C. Present your case and discuss the incident.

D. Call witnesses of your own, but,

1. You must indicate that the witness is available and that his testimony will be relevant to the incident with which you are charged.

2. The Disciplinary Committee has discretion to limit cumulative testimony.
- E. If you are charged with a violation which has been referred for criminal prosecution, you may be represented by legal counsel. In such even a hearing officer may be appointed to take evidence.
11. If the Disciplinary Committee finds that you are innocent of the alleged infraction, you will be so advised and your record will clearly show that you are not guilty.
12. If the Disciplinary Committee determines that you are guilty of the infraction, written findings of fact will be made. These will include:
 - A. Charges.
 - B. Summary of proceedings and evidence presented.
 - C. Evaluation of evidence and rationale for the decision that reflects a consideration of all the evidence and your previous record of conduct in the Facility during your current sentence. The report shall also specify the disciplinary action to be taken including any loss of good time.
13. The reporting officer and the resident will receipt a copy of the Committee's finding and disposition.
14. Every disciplinary proceeding in which you are found to have violated a rule shall be reviewed by the Supervising Officer and may be appealed to the Commissioner.
15. The Supervising Officer may:
 - A. Affirm the decision and punishment.
 - B. Order further or new proceedings.
 - C. Reduce punishment or reverse the decision of the Committee. The Supervising Officer cannot increase the sentence handed down by the Disciplinary Committee.
16. If you wish to appeal the decision, you shall proceed as follows within seven days of the Disciplinary Committee's decision:

- A. Notify the Supervising Officer of your intention to appeal in writing. The Supervising Officer will forward a copy of the record to the Commissioner.
- B. You shall transmit to the Commissioner of Corrections a written statement of your reasons for appeal.
- C. If you wish the punishment suspended until your appeal is decided, you should immediately transmit that request to the Chairman of the Disciplinary Committee along with a copy of your reasons for the supervision. The Chairman has discretionary power to suspend punishment based on the merit of the appeal.
- D. In reviewing the case, the Commissioner may interview the resident or staff or order any other investigation.
- E. Within a reasonable time after the appeal is filed, the Commissioner shall notify you in writing of the action he has taken and his decision.
- F. If your appeal is successful but the punishment has already been executed, the Commissioner will order the record of the offense expunged and grant such other relief as is appropriate and available.
- G. The Commissioner is without power to increase the sentence.

17. Between the time of the alleged rule violation and the Disciplinary Committee hearing, you will normally remain in your current custody status, however, if in the opinion of the Supervising Officer or a staff officer you present a danger to yourself or others or present a risk to the security of the facility, you may be confined to your cell until the Disciplinary Committee hearing. If additional control is deemed necessary, you may be placed in a segregated status, in which case the Disciplinary Committee hearing will be conducted within 72 hours unless continued at your request. Any time spent tagged in, or in segregation, will be considered time served by the Disciplinary Committee.

After your case has been disposed of, if it is still thought that you are a physical threat to yourself, or others, you may be referred to the Classification Committee to determine if the special adjustment unit is an appropriate status.

PUNISHMENT

If you are found guilty the Disciplinary Committee shall assign punishment taking into consideration the frequency as well as the severity of the offenses previously committed.

In addition to or in place of any punishment, the Committee may require that you meet with a member of the staff for counseling.

The punishment assigned by the committee may include the withholding of all or part of good time for the month in which the violation occurred, and/or any one of the following:

1. Reprimand.
 2. Suspended punishment for a specified period of time.
 3. Temporary loss of one or more privileges and/or activities for a specified time.
 4. Tagged in cell not more than 30 days.
 5. Punitive segregation for not more than 15 days.
- You may also be required to pay for destroyed or damaged property. If you refuse to sign an account withdrawal to pay for the amount of the damage, the Facility may place a hold on your account.

Supervising Officer

District Court
Form No. 8

COPY

DISTRICT COURT OF VERMONT

UNIT NO. 2 Chittenden CIRCUIT

State of Vermont

vs.

WAYNE L. CARLSON



Docket No. 1151-73CNcr....

MITTIMUS TO COMMISSIONER OF CORRECTIONS

TO ANY SHERIFF, DEPUTY SHERIFF, STATE POLICE OFFICER, POLICE OFFICER OR CONSTABLE IN THE STATE

On the 28th day of September, 1973, WAYNE L. CARLSON

..... was convicted of the crime of Aggravated Assault
T13 VSA 1024 (a) (1)

and was sentenced by this Court to imprisonment for the term of not less than 3 years months
..... days, nor more than 7 years months days from the date of commitment with
with credit for 123 days served
a credit of months days for time spent in custody prior to sentencing; and was also sentenced
by the Court to pay to the Treasurer of the State of Vermont a fine of dollars.

You are hereby ordered to commit the said WAYNE L. CARLSON
to the Commissioner of Corrections or his authorized representative, who is hereby ordered to receive him in accordance with the sentence.

The Court recommends commitment to

Dated at Burlington, this 28th day of September, 1973.

Judge D. Richardson, Jr.
874-131 Jun 1973 (Mark)

At 1630 o'clock P.M. on the day of 14th Oct, 1973, by authority of
this Mittimus, I committed Wayne Carlson to the correctional facility at Windsor,
the facility designated by the Commissioner of Corrections, and left with the Supervising Officer a true copy of
this Mittimus with my return thereon.

Signed: John Powers

Name and Title JPS

Note: The Commissioner of Corrections has designated that all commitments will be to the correctional facility at Burlington, Rutland, St. Johnsbury or Woodstock, whichever is closest to the sentencing Court except that any person who is sentenced to death or for life will be committed to the correctional facility in Windsor and all sentenced women will be committed to the correctional facility in Woodstock.

926-74 Certified to be a true copy of the
original as the same appears on file
in this office.

James D Richardson
Clerk Vt. District Court
ASST Chittenden Circuit

STATE OF VERMONT
WINDSOR COUNTY, SS

I, Patricia A. Derrick, Clerk of the District Court of Vermont,
Unit No. 6, Windsor Circuit which is a court of Record, having a seal as
hereto attached, do hereby certify that the foregoing is a true copy of the
original record of a cause entitled

STATE OF VERMONT

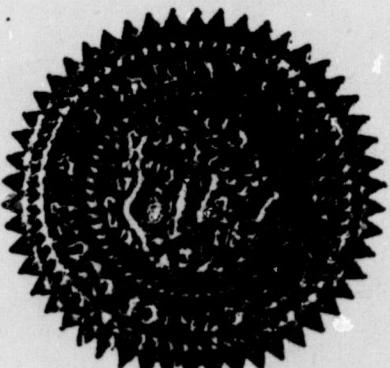
VS.

WAYNE L. CARLSON

together with a true copy of the original mittimus in said cause, as appears
by the records and files of said court, by me this day examined, and herewith
compared.

IN TESTIMONY WHEREOF I have hereunto
set my hand and affixed the seal of
the Court, at Hartford, in said County

this 20th day of September, 1974. -


Patricia A. Derrick
Clerk

District Court
Form No. 8

DISTRICT COURT OF VERMONT
UNIT NO. 2 Chittenden CIRCUIT

State of Vermont

vs.

WAYNE CARLSON

Docket No. 2217-73CnCr

MITTUS TO COMMISSIONER OF CORRECTIONS

TO ANY SHERIFF, DEPUTY SHERIFF, STATE POLICE OFFICER, POLICE OFFICER OR CONSTABLE IN THE STATE

On the 6th day of March 1974 WAYNE CARLSON

was convicted of the crime of Kidnapping all in ~~xxxxxxxx~~ violation of T13 VSA Sec 2401

and was sentenced by this Court to imprisonment for the term of not less than 6 years _____ months _____ days, nor more than 10 years _____ months _____ days from the date of commitment with a credit for time served during his pre sentence investigation of _____ months _____ days for time spent in custody prior to sentencing; and was also sentenced concurrent with his present sentences. by the Court to pay to the Treasurer of the State of Vermont a fine of _____ dollars.

WAYNE CARLSON

You are hereby ordered to commit the said to the Commissioner of Corrections or his authorized representative, who is hereby ordered to receive him in accordance with the sentence.

The Court recommends commitment to Windsor

Dated at Burlington, this 6th day of March, 1974

At 3:15 o'clock P.M. on the day of Mar 6, 1974, by authority of
this Mittimus, I committed Wayne Carlson to the correctional facility at Windsor V.
the facility designated by the Commissioner of Corrections, and left with the Supervising Officer a true copy of
this Mittimus with my return thereon.

Signed:

Richard DeMolay
Name and Title

Note: The Commissioner of Corrections has designated that all commitments will be to the correctional facility at Burlington, Rutland, St. Johnsbury or Woodstock, whichever is closest to the sentencing Court except that any person who is sentenced to death or for life will be committed to the correctional facility in Windsor and all sentenced women will be committed to the correctional facility in Woodstock.

9-26-74 Certified to be a true copy of the original and differs not
original as the same appears on file
in this office.

Jane D Richardson
Asst Clerk Vt. District Court
Chittenden Circuit

STATE OF VERMONT
WINDSOR COUNTY, SS.

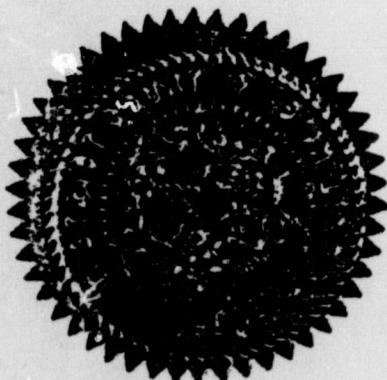
I, Patricia A. Derrick, Clerk of the District Court of Vermont,
Unit No. 6, Windsor Circuit which is a Court of Record, having a seal as
hereto attached, do hereby certify that the foregoing is a true copy of the
original record of a cause entitled

STATE OF VERMONT

VS.

WAYNE L. CARLSON

together with a true copy of the original mittimus in said cause, as appears
by the records and files of said court, by me this day examined, and herewith
compared.



IN TESTIMONY WHEREOF I have hereunto
set my hand and affixed the seal of
said Court, at Hartford in said County
this 26th day of September, 1974.

Patricia A. Derrick
Clerk

District Court
Form No. 8

DISTRICT COURT OF VERMONT

UNIT NO. 6 Windsor CIRCUIT

State of Vermont

Docket No. 38-74.WrCr.

vs.

Wayne L. Carlson

MITTIMUS TO COMMISSIONER OF CORRECTIONS

TO ANY SHERIFF, DEPUTY SHERIFF, STATE POLICE OFFICER, POLICE OFFICER OR CONSTABLE IN
THE STATE

On the ... 17th ... day of ... April ..., 19 74, Wayne L. Carlson

..... was convicted of the crime of Escape

and was sentenced by this Court to imprisonment for the term of not less than ... 0 years 0 months
... 0 days, nor more than five years ... 0 months ... 0 days from the date of commitment with
a credit of ... 0 months ... 0 days for time spent in custody prior to sentencing; and was also sentenced
by the Court to pay to the Treasurer of the State of Vermont a fine of dollars.

Sentence to run consecutively

You are hereby ordered to commit the said Wayne L. Carlson

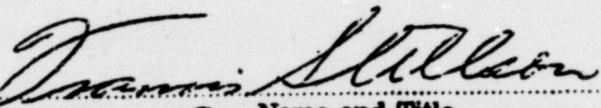
to the Commissioner of Corrections or his authorized representative, who is hereby ordered to receive him in
accordance with the sentence.

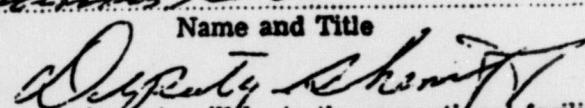
The Court recommends commitment to Correctional Facility at Windsor

Dated at Hartford, this ... 18th ... day of ... April ..., 19 74

J. F. Egan
Judge - Clerk

At 11:25 o'clock A.M. on the day of 18th April, 1974, by authority of
this Mittimus, I committed Wayne L Carlson to the correctional facility at Windsor,
the facility designated by the Commissioner of Corrections, and left with the Supervising Officer a true copy of
this Mittimus with my return thereon.

Signed: 
Name and Title



Note: The Commissioner of Corrections has designated that all commitments will be to the correctional facility at Burlington, Rutland, St. Johnsbury or Woodstock, whichever is closest to the sentencing Court except that any person who is sentenced to death or for life will be committed to the correctional facility in Windsor and all sentenced women will be committed to the correctional facility in Woodstock.

District Court
Form No. 8

APR 4 5 1974

DISTRICT COURT OF VERMONT

UNIT NO. 6 , Windsor CIRCUIT

State of Vermont

' vs.

Wayne L. Carlson.....

Docket No. 404-74.WrCr.
(Count Three)

MITTIMUS TO COMMISSIONER OF CORRECTIONS

TO ANY SHERIFF, DEPUTY SHERIFF, STATE POLICE OFFICER, POLICE OFFICER OR CONSTABLE IN
THE STATE

On the 17th day of April, 1974, Wayne L. Carlson.....

..... was convicted of the crime of Escape.....

and was sentenced by this Court to imprisonment for the term of not less than 0 years 0 months
0 days, nor more than five years 0 months 0 days from the date of commitment with
a credit of 0 months 0 days for time spent in custody prior to sentencing; and was also sentenced
by the Court to pay to the Treasurer of the State of Vermont a fine of ----- dollars.

Sentence to be consecutive

You are hereby ordered to commit the said Wayne L. Carlson.....
to the Commissioner of Corrections or his authorized representative, who is hereby ordered to receive him in
accordance with the sentence.

The Court recommends commitment to State Correctional Facility, Windsor

Dated at Hartford, this 18th day of April, 1974.

J. E. [Signature]
Judge — Clerk

At 11 25 o'clock A.M. on the day of 18th April, 1974, by authority of
this Mittimus, I committed Wayne L Carlson to the correctional facility at Rutland,
the facility designated by the Commissioner of Corrections, and left with the Supervising Officer a true copy of
this Mittimus with my return thereon.

Signed:

Frank Stiller
Name and Title

Frank Stiller

Deputy Sheriff

Note: The Commissioner of Corrections has designated that all commitments will be to the correctional facility at Burlington, Rutland, St. Johnsbury or Woodstock, whichever is closest to the sentencing Court except that any person who is sentenced to death or for life will be committed to the correctional facility in Windsor and all sentenced women will be committed to the correctional facility in Woodstock.

STATE OF VERMONT
WINDSOR COUNTY, SS.

I, Patricia A. Derrick, Clerk of the District Court of Vermont,
Unit No. 6, Windsor Circuit which is a Court of Record, having a seal as
hereto attached, do hereby certify that the foregoing is a true copy of the
original record of a cause entitled

STATE OF VERMONT

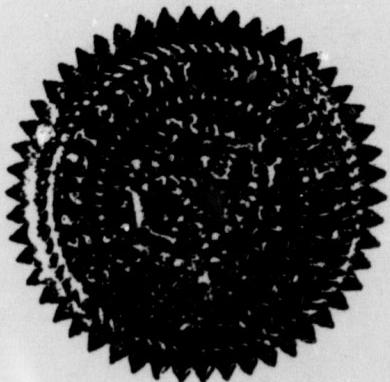
VS.

WAYNE L. CARLSON

Together with a true copy of the original mittimus in said cause, as appears
by the records and files of said court, by me this day examined, and herewith
compared.

IN TESTIMONY WHEREOF I have hereunto
set my hand and affixed the seal of
said court, at Hartford, in said County
this 26th day of September, 1974.

Patricia A. Derrick
Clerk



DISTRICT COURT OF VERMONT

UNIT NO. 6 , Windsor CIRCUIT

State of Vermont

vs.

Wayne L. Carlson.....

Docket No. 404-74 WrCr
(Connt Four)

MITTIMUS TO COMMISSIONER OF CORRECTIONS

TO ANY SHERIFF, DEPUTY SHERIFF, STATE POLICE OFFICER, POLICE OFFICER OR CONSTABLE IN
THE STATE

On the 17th day of April 1974 , Wayne L. Carlson.....

..... was convicted of the crime of Assault and Robbery.....

and was sentenced by this Court to imprisonment for the term of not less than one..... years ..0..... months
..... 0..... days, nor more than five..... years 0..... months 0..... days from the date of commitment with
a credit of 0..... months 0..... days for time spent in custody prior to sentencing; and was also sentenced
by the Court to pay to the Treasurer of the State of Vermont a fine of dollars.

J.D.S.
sentence to run consecutive concurrent to count three of docket # 404-74 WrCr

You are hereby ordered to commit the said Wayne L. Carlson.....
to the Commissioner of Corrections or his authorized representative, who is hereby ordered to receive him in
accordance with the sentence.

The Court recommends commitment to State Correctional Facility, Windsor

Dated at Hartford....., this ... 18th ... day of April 19 74

J. D. Smith
Judge — Clerk

At 11 25 o'clock A.M. on the day of 18th April, 1974, by authority of
this Mittimus, I committed McGinn & Carlson to the correctional facility at Windsor,
the facility designated by the Commissioner of Corrections, and left with the Supervising Officer a true copy of
this Mittimus with my return thereon.

Signed:

Thomas Stillson

Name and Title

Deputy Sheriff

Note: The Commissioner of Corrections has designated that all commitments will be to the correctional facility at Burlington, Rutland, St. Johnsbury or Woodstock, whichever is closest to the sentencing Court except that any person who is sentenced to death or for life will be committed to the correctional facility in Windsor and all sentenced women will be committed to the correctional facility in Woodstock.

STATE OF VERMONT
WINDSOR COUNTY, SS:

I, Patricia A. Derrick, Clerk of the District Court of Vermont, Unit #6,
Windsor Circuit which is a Court of Record, having a seal as hereto attached,
do hereby certify, that the foregoing is a true copy of the original record
of a cause entitled

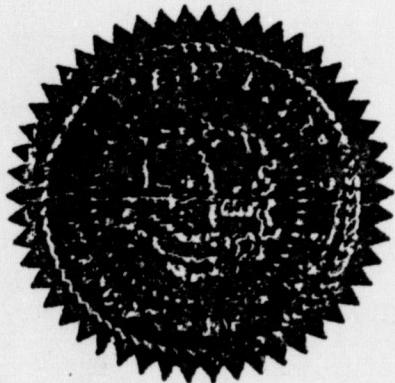
STATE OF VERMONT

VS.

WAYNE L. CARLSON

together with a true copy of the original Mittimus to Commissioner of
Corrections in said cause, as appears by the records and files of said
Court, by me this day examined, and herewith compared,

IN TESTIMONY WHEREOF I have hereunto
set my hand and affixed the seal of
said Court, at Hartford in said County
this 2nd day of December, 1974.



Patricia A. Derrick
Clerk

DISTRICT COURT OF VERMONT
UNIT NO. 6 Windsor CIRCUIT

STATE OF VERMONT

Docket No. 1022-73 WR (E)

VS.

Wayne Carlson a/k/a Joseph Dalton

MITTIMUS TO COMMISSIONER OF CORRECTIONS

TO ANY SHERIFF, DEPUTY SHERIFF, STATE POLICE OFFICER, POLICE OFFICER OR CONSTABLE IN
THE STATE

On the 26th day of February, 19 74, Wayne Carlson a/k/a Joseph Dalton
was convicted of the crime of Escape.

and was sentenced by this Court to imprisonment for the term of not less than three years no months no days,
nor more than five years no months no days from the date of commitment ~~to the State Hospital at Lillie, Illinois~~
~~..... I, the undersigned, do hereby certify that the above sentence is to be served consecutive to time presently serving.~~
~~the State Hospital at Lillie, Illinois~~ TO BE CONSECUTIVE TO TIME PRESENTLY SERVING.

You are hereby ordered to commit the said Wayne Carlson a/k/a Joseph Dalton to the Commissioner of Corrections or his authorized representative, who is hereby ordered to receive him in accordance with the sentence.

The Court recommends commitment to State Correctional Facility; the Court further recommends the Commissioner consider transfer at a later date to a program in another institution that shows promise of assistance to the respondent in rehabilitation.

Dated at Hartford this 26th day of February 19th



SUBJECT

FACILITY

Policy for Out-of-State Transfers

INTRODUCTION

Occasionally it is necessary to transfer an inmate to an out-of-state facility for program, safety, or other reasons.

OBJECTIVES

The intent of this policy is to provide procedures and methods so that these transfers can be carried out in such a fashion that programming is maximized for the offender while at the same time his rights under the law are protected.

GROUP SERVED

All inmates in the custody of the Vermont Department of Corrections who have been identified as having no program alternatives in the State of Vermont, or who are unsafe in Vermont correctional institutions, or who voluntarily request such transfer, shall be covered by this policy. This group can include inmates who are residents of another state and whose programs can best be carried out by that state.

POLICY DESCRIPTION

A. Selection

An inmate may be transferred to a facility out of state under the terms of the New England Corrections Compact, the Interstate Corrections Compact, or Federal agreement, only if one or more of the following criteria for transfer are met.

1. All in-state alternatives have been considered and determined unsuitable because there are not adequate specific treatment and rehabilitative programs available for that individual.
2. All in-state alternatives have been considered and found unsuitable because protections necessary for physical safety are not available for that individual.
3. An inmate voluntarily requests transfer.

B. Procedures

If it becomes necessary to transfer an inmate to an out-of-state facility, the following procedures shall be followed:

1. The inmate shall be notified, in writing, of the proposed transfer and of his right to a hearing before a supervising officer of the institution.
2. If the inmate chooses a hearing, such hearing shall occur prior to transfer. If the inmate does not want a hearing, he may submit a written waiver.
3. The supervising officer will notify the inmate, in writing, of the reasons for upholding or not upholding the proposed transfer.
4. If a prior hearing cannot be afforded because the delay required would endanger the safety of the inmate or the security of the institution, then the hearing may be held within 72 hours after transfer before a hearing officer designated by the Commissioner. The reasons for the delay in hearing shall be given to the inmate in writing.

STATUTORY REFERENCE AND EFFECTIVE DATE

See:

V.S.A. Title 28, Chapter 27 - Interstate Corrections

Compact.

V.S.A. Title 28, Chapter 23 New England Interstate
Corrections Compact.

28 V.S.A. § 706: Transfer to Federal Correctional
Facility.

This policy will be effective February 28, 1973

Kent Johnson

COPY

March 12, 1974

To Whom It May Concern:

This is to certify that on the evening of March 11th., in the presence of Officer Harold Roberts, I verbally notified Wayne L. Carlson of the State's proposal to transfer him to the Federal Penitentiary at Lewisburg, Pennsylvania. I further advised him that a hearing would be held before me on Wednesday morning, March 13th., and that he would have an opportunity to waive this hearing or if he elected to have the hearing, he could have a staff member representing him and could call a reasonable amount of relevant witnesses.

J. V. Moeykens

J. V. Moeykens
Supervising Officer

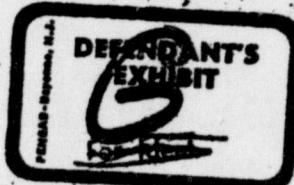
Witness: *Harold A. Roberts*

I further certify that on this date, March 12, 1974, in the presence of Chief of Correctional Services, George Mayo, I handed delivered to Wayne L. Carlson a written notice of his proposed transfer, including his rights to a hearing. I requested him to either sign his waiver to this hearing or sign his acceptance of the hearing and he refused to sign anything before consulting with his lawyer and showing his lawyer this piece of paper. I finally certify that I left with Wayne L. Carlson a copy of this notice signed by myself.

J. V. Moeykens

J. V. Moeykens
Supervising Officer

Witness: *George Mayo*



• Special Confinement Report

NAME CARLSON, WAYNE

C O P Y

NO. /

PUNITIVE SEGREGATION

DATE 3-11-74

TIME 1415

ASON ATTEMPTED ESCAPE

~~1 HOUR CHARGE PER ORDER~~ Mr. LEVINE

DATE ADMITTED 3-11-74

CELL NO. : 1

Date	Officer's Name	Time	Remarks
MEALS	meffair	1530	supper
EXERCISE			
SHOWERS			
CLOTHING			
MISCELLANEOUS			
MISCELLANEOUS			
3-11-74	L Davis	1415	secured in cell
"	"	1450	received (1) paper drinking
"	"	"	cup
"	"	1500	facing back and forth
"	"	"	in cell talking to Tandy
"	"	1530	sitting on mattress - head
"	"		in hands
"	"	1535	(late entry) - said the
"	"	"	next chance he gets he
"	"	"	is going to escape. - ✓
"	"	"	Discussing the escape
"	"	"	with Tandy
"	"	1530	fed up - no officer - Mr.
"	"	"	McFarlane assisted from
"	"	"	B block.
"	"	1535	blanket brought in by
"	"	"	Mr. Fairbanks & socks
"	ROBERTS	5:00	TALKING TO TANDY
"	ROBERTS	6:00	TALKING TO TANDY
"	ROBERTS	6:20	MR. MCKEEKENS TO SEE. ✓
"	ROBERTS	7:00	CARLSON
"	ROBERTS	7:00	TALKING TO TANDY
"	ROBERTS	8:00	" " "
"	ROBERTS	9:00	" " "
"	ROBERTS	10:00	" " "
"	ROBERTS	10:45	going to jail
"	KM	10:48	- 1065 big as can make out

Date	Officer's Name	Time	Remarks
3/11/74			in car - left - to 50% off Alvarez - C. J. Liu - L. S. to assign some time off these W.C.P. assigned to Long Beach
"	Knight	11:00	Talking with Tongi
"	"	11:30	TALKING with Person with Tongi
"	"	12:00	TALKING with Tongi
"	"	12:30	TALKING with Tongi about Affair
3/12/74		0100	Answers delayed
"	"	0130	" "
"	"	0200	" "
"	"	0230	" "
"	"	0300	morning - 1:00 hours
"	"	0330	Answers delayed
"	"	0400	" "
"	"	0430	" "
"	"	0500	" "
"	"	0530	" "
"	"	0600	" "

Special Confinement Report

NAME Carlson, Wayne

S. A. U.

REASON Attempted Escape

To Hour Chuck Purficle Mr. Luvorno

DATE 3-12-74

TIME 0600

NO. 1

PUNITIVE SEGREGATION

DATE ADMITTED 3-11-74

CELL NO.

Date	Officer's Name	Time	Remarks
MEALS	(1600 via Hinged)		
EXERCISE			
SHOWERS			
CLOTHING			
MISCELLANEOUS			
MISCELLANEOUS			
3-12-74	Knigsl	0600	Appears asleep
"	"	0630	" "
"	"	0635	Wash brought by Wk
3-12-74	Kapuscinski	0700	Appears Asleep.
"	"	0722	Attacks. Asked what
"	Kapuscinski	0730	Result of T-2000 exp. test, T-2000
"	"	0735	A-Card To see Mr. Caprice.
"	Call of Mr. Caprice. He would see him.		
"	Kapuscinski	0800	Tell him T-2000
"	"	0805	He fished T-2000 Blood
"	Kapuscinski	0810	Sample To Mr. Caprice. Medical Station conditions
"	"	0815	in this area highly suspect - Dr. Matthews and
"	"	0820	Mr. Davis witness refusal. Made of one cell To V
"	"	0825	current Attorney. Not in place except for
"	"	0830	Attorney. Same. Building. Many problems with Cells
"	"	0910	Visited by Dr. May, Kec and Capt. Wk.
"	"	0925	Mail Call - LT Silo &
"	"	0930	Phone Call - Mr. Davis
"	"	1000	sent To Attala for Mr. Caprice.
"	Kapuscinski	0735	Call to Lawyer Mr. Vieira
"	"	0800	consumed at this time - placed Cell To T-2000
"	"	0950	Exercise (To Ho.)
"	"	1000	Walking very energetically
"	Venturing out BARS and surrounding Area in walkways		
"	Kapuscinski	1010-1020	Secured. (T-2000 active)

Date	Officer's Name	Time	Remarks
7/12/72	Kojucinski	1305	Person T - saw him T-117 - T-1021
"	"	1315	Spotted.
"	G. Davis	1055	Required to see prints - Mr. Kojucinski notified Mr. Silvia -
"	Kojucinski	1135	Medic-Tina - Mr. Hilliff
"	"	1130	Wine - Mr. Hilliff arrived
"	J. Jones	1700	Proceed to K. Hillie office
"	"	1703	Hilfman Ed & Blas - by his talking to Tongue he where is Leavening
"	J. Jones	1707	Again questioning following of Carlson about which - believe it to be LeBlanc
"	"	1709	proceed again following to Carlson (believe it to be) asking again is it going, Carlson asked if he (R. King) had read the Best Free Press
"	Kojucinski	1715	T-117 is T-1021
"	"	1720	Appears to be Doring officer off duty
"	Mr. Tongue	1800	Believe this is about Hillie Commander Fecorriste
"	Kojucinski	1800	Spotted
"	"	1805	1405
"	"	1810	On duty - OK.
"	"	1500	Talking to Tongue
"	"	1530	Visit Mr. Hamilton
"	"	1535	Called Mr. Silvia, see he can call his lawyer, call back
"	"	1600	Call crackle called and he read
"	"	1630	Talking to Tongue
"	"	1700	" " "
"	"	1730	" " "
"	"	1800	" " "
"	"	1830	" " "
"	"	1930	" " "
"	"	2000	" " "
"	"	2030	-109- " " "

Special Confinement Report

DATE 3-12-74

TIME

NO. 1

PUNITIVE SEGREGATION

DATE ADMITTED

3-11-74

CELL NO.

NAME CARLSON WAYNE

REASON ATTEMPTED ESCAPE

1/2 HR CHECK

Date	Officer's Name	Time	Remarks
MFALS			
EXERCISE			
SHOWERS			
CLOTHING			
MISCELLANEOUS			
MISCELLANEOUS			
3-12-74	Reckley	2100	Talking to Tanya
"	"	2130	" " "
"	STAFFORD	2210	" " "
"	"	2300	" "
"	"	2330	May be suicidal
"	"	2400	Talking of suicide
"	"	2430	QUIET, LYING DOWN 1802030 RELEASED
2-13-74	"	0100	
"	"	0130	"
"	"	0200	"
"	"	0230	"
"	"	0300	"
"	"	0330	"
"	"	0400	"
"	"	0430	"
"	W.H. Blue	0500	Affiancted
"	STAFFORD	0520	"
"	"	0600	"

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON

VS.

J. V. MOEYKENS, Warden, Vermont
State Penitentiary, R. K.
STONEMAN, Commissioner of
Corrections, State of Vermont,
Three Unknown Correctional
Officers, acting in their
capacity as Correctional
Officers at the Vermont State
Penitentiary

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Civil Action

File No. 74 224

OPINION AND ORDER

FACTS

On May 27, 1973, Plaintiff, Wayne L. Carlson, escaped from the Burlington Community Correctional Center while awaiting a hearing relative to his deportation to Canada. The escape involved the use of a loaded gun, and a number of correctional facility officers were locked in a cell or other area of the center. The Plaintiff was later apprehended in Burlington.

On June 3, 1973, the plaintiff, who subsequent to the May 27th escape had been transferred to the Windsor State Prison, missed a prison check by placing a dummy in the bed in his cell. He was subsequently apprehended hiding in the arts and crafts section of the prison.

On July 7, 1973, the plaintiff escaped from Windsor State Prison through a window after his cell had been opened by other inmates. He was subsequently apprehended in New Hampshire.

On November 5, 1973, the plaintiff escaped from Windsor State Prison. The escape involved a knife, and a correctional officer was tied up. The Plaintiff was subsequently apprehended in Boston in January, 1974.

On March 11, 1974, the plaintiff escaped from the Windsor State Prison by going over a roof. The escape involved the use of a knife, and correctional officers were tied up. The plaintiff was apprehended a short time later in the Town of Windsor when the car he was using was forced off the road by a police officer and a prison officer giving chase.

In addition to the foregoing incidents, the plaintiff also escaped from the Chittenden County Sheriff's Department in September, 1973. This escaped involved the use of a dummy gun, and members of the Sheriff's Department were disarmed. The plaintiff was eventually recaptured hiding in some woods in the area. The plaintiff was convicted in state court of various offenses arising out of these incidents (Defendant's Exhibit E).

Upon Plaintiff's escape from the Windsor State Prison on March 11, 1974, Defendant Moeykens called Cornelius D. Hogan, Deputy Commissioner of the Department of Corrections, to discuss the Carlson situation. It was Hogan's opinion that the plaintiff was a daring individual with no regard for his personal safety or for the safety of others. He felt that Carlson could not be housed at Windsor consistent with the safety of the community and

its residents, and that no other Vermont facility would be adequate. On the basis of these considerations, he concluded that Carlson would have to be transferred. He regarded the hearing to which Carlson was entitled as a means to bring information to the Commissioner's attention. Only evidence that Carlson had not really escaped that day would have influenced him against transferring the plaintiff. When Carlson was apprehended, Moeykens again called the Department of Corrections. At this time Hogan appointed Moeykens as hearing officer for any hearing on the proposed transfer. In appointing Moeykens as hearing officer for any upcoming hearing, Hogan understood that Moeykens would have authority to make a recommendation which would be carefully considered by the Commissioner.

Upon his return to the State Prison following the March 11th incident, the plaintiff and Anthony F. Tanzi a fellow prisoner involved in the escape were almost immediately placed in punitive segregation. At some time during the evening of March 11th, the plaintiff was visited by defendant Moeykens, the superintendent of the prison. The exact time of this visit is in dispute, but it is immaterial. At that time defendant Moeykens orally advised the plaintiff that the State proposed to transfer him to the United States Penitentiary at Lewisburg, Pennsylvania. He also advised him that a hearing would be held in the near future if Carlson so elected. At such hearing he would have the right to be represented by a staff member and to call a reasonable number of "relevant" witnesses. The plaintiff asked to call his attorney at

this time but was advised by Moeykens that it was too late in the day to do so.

At approximately 9:00 a.m. the following morning, March 12, 1974, the plaintiff placed phone calls to Attorney Edward Kiel of Springfield and Attorney Richard Blum of Burlington, neither of whom was available. At approximately 9:30 a.m. he succeeded in reaching Attorney Kiel by phone and spoke with him. Also on the morning of March 12, defendant Moeykens provided the plaintiff with written notice of a hearing before Moeykens regarding plaintiff's proposed transfer, the hearing to be held at 8:30 a.m. on March 13, 1974 (Plaintiff's Exhibit I). The notice stated the reason for the proposed transfer:

Your repeated escapes and the violent nature of those escapes renders all Vermont Facilities unsuitable because there are no adequate treatment and rehabilitative programs available for an individual with the level of security you require.

The notice provided that Carlson should advise in writing by 12:00 p.m. on March 12th if he wished a staff member to represent him and the name of any witnesses he wished to call. Upon the advice of his counsel the plaintiff refused to sign the notice. Had he done so it would have allowed him to designate thereon whether he desired staff member representation and to identify such witnesses as he wished to call.

A twenty minute hearing which plaintiff attended was held at the scheduled time on March 13, 1974. The proceeding was tape recorded and duly transcribed. (Plaintiff's Exhibit 2). Much of

the hearing involved a discussion with plaintiff relative to his failure to indicate on the notice a request for staff representation or for witnesses in his behalf. The hearing provided the plaintiff an opportunity to state reasons why he should not be transferred to the federal system as a security measure, but he presented none other than to state that he "strongly" protested his proposed transfer and that he would not object to being turned over to the Canadian authorities. A request by the plaintiff at the hearing that his attorney be present and his later request during the hearing for representation by an inmate were denied. A written decision was prepared by defendant Moeykens (Plaintiff's Exhibit 3) on March 13, 1974, and a copy was furnished to the plaintiff on the same date. The notice of decision accurately summarized the proceedings at the hearing and concluded that the plaintiff should be transferred to the federal prison at Lewisburg as "the security factors present in any attempt to program you any longer in Vermont outweigh the considerations you presented at the hearing." The transfer hearing was conducted in accordance with a written departmental policy for out of state transfers which had been in effect since February 28, 1973. (Defendant's Exhibit F).

Anthony Tanzi, the prisoner who had escaped with Carlson, was not transferred but was disciplined within the prison following a tape recorded disciplinary hearing before an impartial hearing officer at which he was given the opportunity to confront and examine witnesses against him as well as to present witnesses on his own behalf. Prior to the hearing Tanzi was notified of the charges

against him and, since the violation was one which had been referred for criminal prosecution, he was allowed legal counsel. He was subsequently charged criminally. Carlson was not charged with a breach of prison discipline because he was transferred almost immediately after his recapture.

Plaintiff was transferred by automobile to the United States Penitentiary at Lewisburg, Pennsylvania, on March 14. At Lewisburg he was confined for approximately three weeks in the admitting and orientation unit and was then transferred to the "A" block general housing area. He was subsequently returned to Lewisburg where he remained until the end of July when he was transferred to the United States Penitentiary at Marion, Illinois. Plaintiff remained at Marion until he was returned to Vermont for the trial of the instant case.

Prior to his escape on March 11, 1974, and subsequent to his transfer to the federal prison system, the plaintiff had been disciplined by the Vermont prison authorities from time to time for his escapes and attempted escapes. As a result of these various disciplinary procedures the plaintiff was confined in the special adjustment unit of the prison known as "A" block for virtually all of the time he was at Windsor with the exception of such punitive segregation confinements that he received upon occasion. IN "A" block he was locked in his cell for approximately 18 hours a day and enjoyed few of the privileges afforded the members of the general prison population confined in other areas. The plaintiff was allowed out of his cell to eat, clean up and exercise, but his

movement was restricted to an eight foot corridor in front of the cells and a small outside exercise area. He was denied the free run of the institution, and in general he was not permitted to engage in those activities and programs allowed the inmates who were not residents of "A" block such as arts and crafts, intramural sports, and the like.

At Lewisburg the plaintiff was in close custody but with virtually no restriction on his movement within the institution. His cell was generally open except for counts, and there were many activities and facilities available for his use including television, movies, cards, various outdoor and gymnasium sports, pool tables, a commissary, musical instruments, arts and crafts, courses of instruction in various fields, both practical and educational, a general library, a law library and the like.

Eventually Carlson was classified at Lewisburg but pending such classification he worked in the prison kitchen. During that time he had at least one discussion with the correctional treatment specialist in charge of his case about training in the central dental office. He showed considerable interest in training to be a draftsman, however, there were no openings in the draftsman program. For that reason he was assigned to the assembly line of the prison industries on a temporary basis for which he was paid 23 cents an hour. After he learned that he could not immediately get into the draftsman program, Carlson demonstrated virtually no effort to become involved in any sort of self improvement program, and at one time he refused to work, prompting

his placement in punitive segregation.

Around the end of May a decision was made to classify Carlson for transfer to the United States Penitentiary at Marion, Illinois. He was transferred on or about July 5, 1974 to that institution with a 13 day interim stop at a federal correctional facility in Terre Haute, Indiana. This transfer was made in view of his record of escapes and other criminal involvement as well as his general lack of interest in the Lewisburg programs. At Marion, Carlson requested protective custody because it was his feeling that state prisoners were often treated very badly by the federal inmates. Accordingly he was segregated from the general prison population in the administrative detention and punitive detention unit.

Carlson has a common law wife who resides in Edmonton, Alberta. She never visited him during the period of time he was confined at the Vermont State Prison although she was arranging to do so at the time of his transfer. She did visit him once at Marion. He has no family in Vermont, and at no time during his stay in Vermont did any family members make application to visit him. At Lewisburg Carlson found it more difficult to communicate with his Vermont counsel but was allowed to write and receive uncensored mail from his Vermont attorneys although on one occasions one of his attorney's letters was late. Visitation rules at Lewisburg were as liberal, if not more so, than in Vermont, however, the Vermont prison policy permitted two social telephone calls a month whereas at Lewisburg the policy was only one social call every three months.

There is no reason to believe that all of the plaintiff's applicable records from the Vermont State Prison were not sent to the federal system when Carlson was transferred. At the least the correctional treatment specialist in charge of his case had no reason to believe that any were missing. If any of the plaintiff's personal property, consisting of photograph and personal papers, was not transferred to Lewisburg from the Vermont state prison as he alleges, it does not appear that this was the result of any willful conduct on the part of the defendants. Furthermore the evidence is silent as to whether the plaintiff called Windsor or Lewisburg or took any steps to recover his belongings.

HISTORY OF THE LITIGATION

On September 4, 1974, this court granted plaintiff leave to file his pro se complaint in this action in forma pauperis.^{3.} At the same time James R. Flett, Esq. of the Vermont Office of the Defender General was appointed by the Court to represent the plaintiff. On December 12, 1974, after Plaintiff's return to Vermont for purposes of trial and after virtually all discovery was complete,^{4.} plaintiff was granted leave to file an amended complaint. Plaintiff alleges that his transfer from the Vermont the the federal prison system does not comport with the due process and equal protection requirements of the Fourteenth Amendment to the United States Constitution.

In support of his due process claim the plaintiff alleges that prior to any disciplinary action or transfer he was entitled

to a hearing at which he would be afforded the right (a) to prior notice of the charges against him; (b) to be presented with the evidence against him; (c) to confront and examine the witnesses against him; (d) to have a determination made by a neutral and detached hearing officer or officers and (e) to have written findings based on the evidence presented at the hearing. His equal protection claim the plaintiff alleges arises from the existence of two classes of disciplinary hearings created by the defendants. The first class includes hearings for those inmates accused of major disciplinary infractions for whom a transfer from the prison is not contemplated. Those inmates receive a hearing substantially of the type which plaintiff alleges due process requires should have been given him in this instance. The second class is comprised of hearings for inmates where the hearing will result in their transfer to the federal or other out of state system. These inmates, he claims, receive a hearing substantially different in form and content than hearings given to the first class of inmates.

The plaintiff does not question that the state has the necessary authority by statute and contract to effectuate transfers
5.
from the Vermont prison system to the federal prison system.

CONCLUSION OF LAW, OPINION
AND ORDER

28 U.S.C. Section 1343 (3) provides the necessary jurisdiction for this court to entertain this action brought pursuant to 42 U.S.C. Section 1983.

I.

The issue we are asked to determine is the kind of procedure to which the plaintiff was entitled before he could be transferred from the Vermont prison system to the federal prison system. Plaintiff claims that the transfer was a punitive measure and that he was denied some of the procedural safeguards which he should have received because of its disciplinary nature. Admittedly, plaintiff did not receive all of the procedural process afforded inmates facing major disciplinary action within the prison. Defendants claim, however, that the reason for the transfer was administrative rather than disciplinary and that plaintiff received all the process to which he was entitled, and perhaps more.

At the time of this incident in March 1974, the Department of Corrections had prescribed two different sets of procedures applicable to disciplinary and out of state transfer situations respectively. (See Plaintiff's Exhibit 5 and Defendant's Exhibit F). In each instance the inmate was entitled to a notice of hearing, a hearing, and a statement giving written reasons for any action taken as a result of the hearing. The procedures to be followed in a disciplinary situation were, and are, considerably more detailed and explicit than those provided for out of state transfer hearings. In fact, the Department's procedures in effect for disciplinary hearings at the time of plaintiff's last escape not only exceeded the requirements for such hearings laid down in June 1974, by the Supreme Court in Wolff vs. McDonnell, 42 U.S.L.W. 5190 (U. S. June 26, 1971), but also exceeded the

requirements of the Vermont statutes. 28 V.S.A. Section 852
6.
(Supp. 1974).

Our initial examination of this matter starts with the proposition that the characterization of reasons for the transfer of a prisoner as "disciplinary" or "administrative" provides no useful basis for determining what procedural pre-requisites are in order. In the transfer of a prisoner, "the adverse consequences to the prisoner and the chance of error are the principal elements to be considered in determining what process is due the transferred prisoner, rather than the label put on the transfer." Newkirk vs. Butler, 499 F. 2d 1214, 1217 (2nd Cir. 1974). In plaintiff's case, we have substantial doubts that his transfer from Windsor to Lewisburg "had consequences sufficiently adverse to be properly characterized as punitive." United States ex rel. Haymes vs. Montanye, No 74-1208 at 30, (2nd Cir. Oct. 4, 1974) petition for cert. filed sub nom. Montanye vs. Haymes, 43 U.S.L.W. 3282 (U.S. Nov. 1, 1974) (NO. 74-520). Haymes notes that the dislocation alone may constitute sufficient hardship to warrant a pre-transfer hearing. But in the case before us, we find a prisoner who had neither Vermont family nor roots and who was severely restricted both as to movement and opportunity for recreation and other activities at Windsor. This same prisoner now complains of transfer to a federal facility where there was virtually no restriction on his movement within the walls of the prison and which had a significantly greater number of activities and programs available for such use as he might care to make of them. The

administrative and classification procedures to which plaintiff was subject upon arrival at Lewisburg were relatively brief and can scarcely be considered more onerous than the close confinement which his escape efforts won for him in Vermont.

Nor do we consider plaintiff's claim of deprivation for loss of personal property, decrease in the allowable number of social telephone calls, distance from Vermont counsel, and lack of content with the Vermont Parole Board to be persuasive.

We doubt the hardship to Carlson not because under most circumstances the loss of these items would not be felt, but because the evidence does not suggest that plaintiff experienced any such hardship. He took no steps to retrieve any property which may have been missing or to call its disappearance to the attention of authorities. The evidence fails to establish that plaintiff made use of the telephone policy at either institution, or that the distance from Vermont made for serious communication problems with his attorney or with the Vermont Parole Board which in any event he would have no reason to contact until such time as he becomes eligible for parole in 1978.

Such deprivation as may have occurred must spring from plaintiff's separation from whatever friends he may have made while incarcerated at Windsor. But the same opportunities to develop friendships await a transferred prisoner at a new institution, and in any event, the normal comings and goings within a penal population necessarily dictate a constantly changing group of individuals available for friendship purposes. Such hardship as the transfer may impose through the deprivation of friends at best

transitory and not of a magnitude to be considered any greater than that which the ordinary person in society in general must face. Plaintiff did testify that he felt he was treated poorly by the federal prisoners at Marion. Eventually he requested to "lock up" in protective custody. But this latter deprivation or hardship arose from a subsequent transfer within the federal system for which defendants in this lawsuit may not be held responsible.

In sum, we believe that plaintiff has suffered but little, if at all, by reason of his transfer from Windsor to Lewisburg. Since the procedural safeguards to which he was entitled depend in large degree upon the hardship to which he was exposed, we are of the opinion that a bare minimum of procedure would have been constitutionally sufficient to safeguard plaintiff's rights. It remains for us to consider whether defendants discharged their responsibility to give him due process of law.

Although we recognize that plaintiff's escape from Windsor on March 11th exposed him to charges of a major disciplinary violation for which he could be punished and for which transfer to another facility could be recommended, we hold that his repeated escapes and escape attempts and their violent and menacing nature provided defendants with a valid administrative reason to seek his immediate transfer to the federal system and to dispense with any disciplinary action against him. Defendants elected to pursue this course of action, and for this reason it was proper to follow the department's policy for out of state transfers rather than the

procedures outlined for disciplinary matters.

We hold that plaintiff received adequate notice of the transfer hearing and of the reasons for the proposed transfer. Plaintiff received oral notice of the March 13th hearing on the evening of March 11th and written notice on the morning of March 12th. The reasons for the proposed transfer mentioned in the notice were stated to be plaintiff's "repeated escapes and the violent nature of those escapes which render all Vermont Facilities unsuitable . . ." (Plaintiff's Exhibit I). The specifics of these incidents were so well known to plaintiff that no further clarification was needed to alert him to the subject of the hearing in the absence of a showing by the plaintiff that he had not in fact perpetrated the offenses for which it was proposed to transfer him.

We find that plaintiff was offered the opportunity to call witnesses in his behalf, to offer evidence, and to have a staff member represent him at the hearing. He declined to take advantage of these offers. This was his choice, and the fact that he declined upon the advice of counsel does not affect the knowing nature of the waiver of these rights. Parenthetically, considering the evidence presented at trial which established what a grave threat plaintiff's escape activities posed to the security of the institution, we note that it is extremely doubtful that the testimony of witnesses or that representation by staff counsel would have altered the outcome of the hearing. Further, we note that the chance to confront or to cross examine witnesses would have been of no benefit to plaintiff in this case since the

evidence which warranted transfer consisted of his own long history of escapes from Vermont institutions. And in any event, if no constitutional right to confront or to cross examine obtains in major disciplinary actions, a fortiori, such rights would not obtain here. Wolff vs. McDonnell, supra at 5199.

We also find that the notice of decision which plaintiff received is an adequate statement of the reasons for the transfer in question. (Plaintiff's Exhibit 3). Together with the taped transcript of the hearing, (Plaintiff's Exhibit 2), it more than adequately protects plaintiff "against collateral consequences based on a misunderstanding of the nature of the original proceeding." Wolff vs. McDonnell, supra at 5198.

Plaintiff's most serious allegation is that the superintendent of the Windsor facility, defendant Moeykens, was a partial and non-neutral hearing officer. The allegation of partiality breaks down further into two contentions: that Defendant Moeykens felt a personal antipathy for plaintiff and secondly, that defendant was so involved with the tentative decision to transfer the plaintiff that he was not an appropriate hearing officer.

In order to establish Moeyken's ill will, plaintiff testified to arguments between he and Moeykens during his stay at the prison. Plaintiff presented evidence that Moeykens had testified against him in a criminal proceeding and was the complainant to the state's attorney upon occasions involving other charges. Plaintiff also testified that Moeykens had interrupted an earlier disciplinary

and classification hearing in which plaintiff was involved and ultimately suspended the hearing permanently. Plaintiff introduced evidence intended to show a hostile attitude on Moeykens' part when plaintiff returned to Windsor after the March 11th escape, including a verbal exchange between them later that evening in the punitive segregation area of the prison. Conversely, defendant Moeykens testified to no dislike to or bias against the plaintiff, and except for his propensity to escape, found him to be a good prisoner who caused few internal problems.

Based on the evidence, we find that Moeykens had a valid reason for suspending the disciplinary and classification hearing and that the plaintiff in no way suffered any prejudice as the result of such suspension. We are not satisfied that the evidence establishes that defendant Moeykens was biased against the plaintiff. We note that in small facility such as Windsor the superintendent will become personally acquainted with the inmates under his supervision. Such personal interaction is not sufficient to show bias. But regardless of any animosity that Moeykens may have harbored, there is a complete lack of credible evidence to establish that plaintiff's transfer was motivated by or was the result of such bias. To the contrary, the evidence clearly shows that it was the security risk which plaintiff's conduct posed to the prison that was the sole reason for his transfer.

Plaintiff's second contention raises a more troublesome issue. An impartial decisionmaker is a fundamental requirement of due

process. Morrissey vs. Brewer, 408 U.S. 471, 485-86 (1972).

Wolff vs. McDonnell, supra at 5209 (Marshall dissenting in part).

In disciplinary proceedings Justice Marshall is of the opinion that due process is satisfied so long as the decisionmaker has had no part in the prosecution or investigation of the case. This principle is based on the observation that one who has accepted the role of an advocate is in no position to judge the merits of the claims for which he argues.

A decision to transfer a prisoner for valid administrative reasons differs, however, from a disciplinary proceeding in important respects. A decision to transfer lies in the sound discretion of prison authorities. So long as there is an adequate rational basis for a decision it is not within the province of the courts to interfere. Obviously where a decision is discretionary, it is particularly important for an inmate who hopes to influence that decision to have access to the decisionmaker. See Gomes vs. Travisono, 490 F. 2d 1209, 1216 (1st Cir. 1973), vacated sub nom. Travisono vs. Gomes, for reconsideration in light of Wolff vs. McDonnell, 42 U.S.L.W. 3710 (July 8, 1974) (No. 73-1335). Ideally a hearing procedure for out of state transfers would both provide autonomous and detached hearing officers and yet also preserve access to the decisionmaker in whose discretion the ultimate decision lies. Unfortunately, the ideal frequently is not achieved in real situations for a variety of reasons.

Any transfer hearing implies a prior tentative decision to transfer the inmate in question. It does not appear that Moeykens played any significant part in the initial stages other than to

report that Carlson had escaped again on March 11th and to indicate that he was aware of the security risk that Carlson's presence presented to the institution. The decision to transfer was made by officials at the Department of Corrections. Department counsel then instructed Moeykens to hold a hearing at which plaintiff was entitled to the rights discussed previously. At the hearing Moeykens repeatedly invited plaintiff to offer reasons why he should not be transferred in accord with the tentative decision. (Plaintiff's Exhibit 2). The transcript of the hearing before defendant Moeykens and the testimony at trial both indicate that any recommendation that Moeykens might have made to the Department of Corrections at the close of the hearing would have been given such great weight that it might well have been determinative of the transfer issue.

Bearing in mind the special requirements of a hearing prior to a discretionary decision of this nature, we cannot say that due process was denied. First, it is important to note that the discretion to transfer a prisoner is carefully regulated by the criteria for transfer set out in the Department of Corrections bulletin covering out of state transfers.⁸ Wolff indicates that a carefully defined area of discretion can offset some shortcomings in the impartiality of the hearing officer or board. Wolff vs. McDonnell, supra at 5200. Further, the evidence indicates that Moeykens was as open minded as the nature of the plaintiff's escape activities permitted. Moeykens may have agreed with the tentative decision to transfer plaintiff, but the transcript of the hearing indicates that he was disposed to give careful consider-

ation to such additional information as plaintiff might bring forward. The facts concerning plaintiff's many escapes were not in dispute. Consequently, this was not a situation which posed any danger that a discretionary decision might be built on a wholly illusory factual foundation. For this reason the demands of due process could be relaxed. Newkirk vs. Butler, supra at 1217. Further, although defendant Moeykens may have been less detached than would be desirable by reason of his knowledge of the details of Carlson's exciting career, this same familiarity would lend great weight to any recommendation he might make to the Department of Corrections concerning the proposed transfer. The weight accorded the hearing officer's recommendation, as we have previously discussed, is extremely important in discretionary decisions. Finally, we note that Moeykens was the logical officer to conduct the hearing from an administrative point of view. The demands of due process must be balanced against the realities of time and expense.

Due process must be flexible to adapt to an infinite variety of situations, but this flexible quality poses an equally infinite number of problems for administrators.

At this juncture we reaffirm our order in Bousley and Messier vs. Stoneman, Civil No. 6679 (June 11, 1973), with respect to out of state transfers for administrative reasons. In light of Wolff we further mandate that at the hearing the inmate "be allowed to call witnesses and present documentary evidence in his defense, when permitting him to do so will not be unduly hazardous to

institutional safety or correctional goals." Wolff vs. McDonnell, supra at 5198. We also recommend, although Wolff specifically does not require, that the inmate be allowed representation by lay counsel where feasible. Additionally we suggest that the Department of Corrections endeavor to develop a procedure whereby the hearing officer will be other than the official who has proposed the transfer or who may be responsible for the ultimate decision to transfer, consistent with the necessary discretion of the supervising official and the inmate's ability to have a meaningful input into that discretion. See Gomes vs. Travisono, supra at 1216.

In addition we strongly recommend that in all instances where an out of state transfer is contemplated for arguably punitive reasons or where a transfer is likely to be the result of a major disciplinary infraction by a prisoner, such prisoner should receive a hearing incorporating all the procedures afforded to those inmates against whom major disciplinary charges 10. are pressed within the facility. Where the reasons for the transfer are administrative, we hold that the procedures specified in our order of June 11, 1973, as modified herein, are adequate to guard an inmate against the punitive side effects of ostensibly administrative transfers and that such a hearing afford due process of law.

II.

Although plaintiff urges his due process claim more strongly, he has also advanced a claim that the procedures in effect at the

time of his transfer have denied him equal protection of the law. He alleges that the Vermont Department of Corrections has established two sets of procedures, one for those inmates charged with major disciplinary violations and one for those whom the Department wishes to transfer out of state to another prison system. There is no question but that two sets of procedures exist, the only issue is whether there is a rational basis for the distinction.

There is no valid reason why the procedural safeguards prescribed by the Department of Corrections for hearings involving the transfer of prisoners to out of state facilities need be identical, quantitatively or qualatively, to those safeguards afforded prisoners in major disciplinary hearings, so long as in each instance they are adequate to protect the due process rights of the prisoner involved. The circumstances which require the hearing should be scrutinized, and the prison authorities should make certain that the prisoner receives all of the process to which those circumstances entitle him.

It is also well to consider the underlying purposes for the two types of hearings. In a disciplinary hearing a determination of the guilt or innocence of the prisoner is the outcome although the hearing also may serve to acquaint the decisionmaker with such extenuating circumstances as may affect the eventual punishment. In a transfer proceeding a tentative decision to transfer has already been made by the authorities. The hearing, in addition to acquainting him with the reasons for the proposed action, provides the prisoner with a forum wherein he can present evidence to demonstrate that the reasons for transfer are faulty or otherwise show why he should not be transferred. Such a hearing is likely

to provide the ultimate decisionmaker with additional facts for his own use in the exercise of his discretion. Thus, although the two hearings are not completely dissimilar, the object of each is not the same. We hold that the procedural dissimilarities do not deprive the plaintiff of equal protection of the law.

WHEREFORE, plaintiff's application for a preliminary and permanent injunction and other requested relief is denied.

Judgment shall be entered for the defendant,

DATED at Burlington in the District of Vermont, this 24th day of January, 1975.

/s/ Albert W. Coffrin
District Judge

FOOTNOTES

1. A similar policy for out of state transfers of prisoners was ordered by this Court in the case of Bousley and Messier vs. Stoneman, Civil No. 6679 (June 11, 1973), in accordance with an agreement reached by counsel for the parties to that action.

Pursuant to the stipulation of the parties in the above action, it is hereby ORDERED AND DECREED by this Court as follows:

1. The Vermont Department of Corrections may transfer the plaintiffs or either of them to a facility outside the State of Vermont under the terms of the New England Corrections Compact, the Interstate Corrections Compact, or federal agreement, only after all in state alternatives have been considered and found to be unsuitable because they do not provide an adequate treatment, custody or rehabilitative program for that plaintiff. If a plaintiff voluntarily requests such a transfer, it is not necessary to first consider instate alternatives.

2. A plaintiff whose transfer is proposed shall be entitled, except in case of emergency, to advance written notice of the proposed transfer and right to a hearing before transfer. In case of emergency a hearing before an appropriate person or body shall be afforded promptly after transfer.

3. If at hearing the transfer is approved over the plaintiff's objections, the reasons for such decision shall affirmatively appear in writing.

It is recommended by the Court without the binding effect of an order that the Vermont Department of Corrections follow the procedures set forth above with respect to future transfers of inmates to facilities outside the State of Vermont and to that end the Vermont Department of Corrections promulgate regulations implementing this recommendation in the near future.

2. The exact nature of the particular criminal offense for which the plaintiff was returned to Vermont does not appear from the evidence. During the time the plaintiff was in Vermont for these proceedings, he was charged criminally with the escape of March 11, 1974.

3. At the time of trial the plaintiff acknowledged certain inconsistencies and inaccuracies in his pro se complaint which he attributed largely to those inmates who assisted him in its preparation.

4. The amended complaint bears the same caption as the original complaint, although Paul Davallou, the present superintendent of the Windsor Correctional Facility, is named as an additional defendant in the body of the complaint. The file does not disclose, however, that the amended complaint was ever served upon him, and accordingly he is not before the court. Norman A. Carlson, Director of United States Prisons, was dropped as a defendant in the amended complaint, presumably upon the earlier suggestion of the court that he was an improper party and that in any event any claim against him would be severed from the claims against the other defendants and would be transferred to forum more appropriately located geographically.

5. 18 U.S.C. Section 5003; 28 V.S.A. Section 706 (supp. 1974); Plaintiff's Exhibit 4.

6. The Department of Corrections regulations exceeded the requirements of both Wolff and the Vermont statute combined. Both Wolff and 28 V.S.A. Section 852 (supp. 1974) required that the inmate facing disciplinary action be given notice of the charges against him and that he be allowed to call witnesses and present evidence. Wolff required that he be given a statement by the fact finder as to the evidence relied upon and the reason for the disciplinary action; 28 V.S.A. Section 852 required that he be given the opportunity to confront the witnesses against him and to call upon the assistance of an officer or employee of the institution to assist him in the preparation and presentation of his case. The Department of Corrections Regulations provided that the Disciplinary (fact finding) Committee should consist of three impartial members no member having been involved with the incident of having prepared the formal charge. At any hearing before the Committee the inmate should have the right "to question all persons called as witnesses" (which we take to mean examine and cross examine witnesses as appropriate) and the right to be represented by legal counsel if the violation charged is one which has been referred for criminal prosecution. In addition the regulations provided that any determination unfavorable to the inmate be reviewed by the supervising officer and also provided for the right of appeal to the Commissioner of Corrections. See Plaintiff's Exhibit 5.

7. Newkirk and Haymes discuss in detail the due process and equal protection problems which arise in connection with intrastate transfers within a major state prison system. We consider the discussion in those cases to be equally applicable to interstate transfers, state and federal, from Vermont's sole maximum security facility at Windsor.

8. The Vermont regulations carefully confine the discretion to transfer an inmate to an out of state institution to certain specified situations. An inmate may be transferred "only if one or more of the following criteria for transfer are met."

1. All in-state alternatives have been considered and determined unsuitable because there are not adequate specific treatment and rehabilitative programs available for that individual.
2. All in-state alternatives have been considered and found unsuitable because protections necessary for physical safety are not available for that individual.
3. An inmate voluntarily requests transfer.

Policy for out of state transfers. (Defendants' Exhibit F).

9. See note 1, infra.

10. The Vermont Legislature has provided that transfer from one facility to another may be the result of a hearing for serious disciplinary infractions.

Except in serious cases, punishment for breach of the rules and regulations of the facility shall consist of deprivation of privileges. In cases of assault, escape or attempt to escape, or other serious breach of the rules, the disciplinary committee may recommend to the supervising officer of the facility, and he may order, in addition to or as substitution for a loss of privileges, that any portion of an inmate's reduction of term for good behavior be forfeited or withheld in accordance with section 812 of this title. Recommendation by the disciplinary committee and by the supervising officer also may be made to the commissioner that the inmate be transferred to another facility. . .

28 V.S.A. Section 853(a) (supp. 1974).

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Civil Action File No. 74-224

WAYNE CARLSON)	
)	
v.)	
)	
J. V. MOEYKENS, Warden, Vermont)	JUDGMENT
State Penitentiary; R. KENT)	
Stoneman, Commissioner of Correc-)	
tions; and THREE UNKNOWN CORRECTIONAL)	
OFFICERS, acting in their capacity as)	
Correctional Officers at the Vermont)	
State Penitentiary)	

This action came on for trial (hearing) before the Court,
Honorable Albert W. Coffrin, United States District Judge, presid-
ing, and the issues having been duly tried (heard) and a decision
having been duly rendered,

It is Ordered and Adjudged that Plaintiff's application for
a preliminary and permanent injunction and other requested relief
is denied. Judgment is entered for the Defendants.

Dated at Burlington this 24th day of January, 1975.

EDWARD J. TRUDELL
Clerk of Court

By: /s/ LEONARD W. LAFAYETTE
Chief Deputy Clerk

Endorsed: Filed January 24, 1975

LEONARD W. LAFAYETTE

Chief Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON,

Plaintiff,

v.

J. V. MOEYKENS, Warden, Vermont State
Penitentiary,

R. K. STONEMAN, Commissioner of Corrections,
State of Vermont,

Civil Action File
No. 74-224

PAUL DAVALLOU, Warden, Vermont State
Prison, Windsor, Vermont,

THREE UNKNOWN CORRECTIONAL OFFICERS,
acting in their capacities as Correctional Officers at the Vermont State
Penitentiary,

Defendants.

MOTION FOR A REHEARING

NOW COMES the Plaintiff in the above-captioned matter, and moves the Court, pursuant to F.R.C.P. Rule 59(a), to set aside the findings of fact and conclusions of law heretofore filed herein and the judgment herein entered on January 24, 1975, and to grant this Plaintiff a rehearing on the following grounds:

1. The Court misstated the Plaintiff's equal protection claim. The Court, at pages 10 and 21 of its Opinion and Order, states that the Plaintiff's equal protection claim alleges "that the Vermont Department of Corrections has established two sets of procedures, one for those inmates charged with major disciplinary violations and one for those whom the Department wishes to transfer out-of-

state to another prison system." Opinion and Order at Page 21. In his Amended Complaint, however, Plaintiff alleges only that Defendants have established these two separate procedures in situations "when the disciplined inmate is or may be subjected to criminal proceedings." Amended Complaint, Paragraph 20, Page 5. Thus, Plaintiff at no time claimed that he was denied equal protection solely because he did not receive the same hearing as a prisoner charged with a major disciplinary infraction, as the Court states at Page 10 of its Opinion and Order. Rather, as stated in Plaintiff's Memorandum of Law, Plaintiff claimed he was denied equal protection in that a) the Vermont Department of Corrections had a policy of permitting legal counsel and providing an independent hearing officer in hearings which concerned activity that was also the subject of criminal charges, and b) Plaintiff was not permitted legal counsel and an independent hearing officer at his hearing despite the fact that the subject of the hearing involved activity which had already been referred to the state's attorney for criminal prosecution.

2. The Court failed to rule on the Plaintiff's equal protection claim. At page 22 of its Opinion and Order, the Court holds that the procedural dissimilarities between hearings involving major disciplinary violations and hearings involving the possibility of out-of-state transfer "do not deprive the Plaintiff of equal protection of the law." But Plaintiff's claim is that dissimilarities between such hearings violate equal protection only when the subject of the hearing concerns activity which has been or will be referred to the state's attorney for criminal charges.

Plaintiff argues in his Memorandum of Law, at Page 12, that the purpose in permitting legal counsel and providing an independent hearing officer in such hearings is "the commendable concern on the part of prison officials, that because of the potential criminal charges, the risk to the prisoner is sufficiently great as to require the added protection of legal counsel and an independent hearing officer," and that, therefore, "it makes no rational difference whether the hearing is called 'disciplinary' or 'transfer,' 'punitive' or 'administrative,' or whatever." At no point does the Court rule on this claim. Rather, the Court rules only on the claim, never asserted by Plaintiff, that differences between any disciplinary and transfer hearings deny equal protection.

DATED at Montpelier, Vermont, this 27th day of January, 1975.

/s/ James R. Flett
JAMES R. FLETT
Defender, Correctional Facilities
Attorney for Plaintiff
43 State Street
Montpelier, VT 05602

Office of the
DEFENDER
GENEVE
MAY
Vermont 05602
802-828-3168

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON

VS.

J. V. MOEYKENS, Warden,
Vermont State Penitentiary,
R. K. STONEMAN, Commissioner
of Corrections, State of Vermont
Three Unknown Correctional
Officers, acting in their
capacity as Correctional
Officers at the Vermont State
Penitentiary

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* Civil Action
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* File No. 74-224
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OPINION AND ORDER

In this matter the Defendant has moved for a rehearing pursuant to Rule 59(a) of the Federal Rules of Civil Procedure on the ground that the Court in its opinion and order of January 24, 1975 has "misstated the plaintiff's equal protection claim." Plaintiff's amended complaint in this action asserts that he was denied equal protection of the law because the defendants "set up two classes of disciplinary hearings when the disciplined inmate is or may be subjected to criminal proceedings." (emphasis supplied). The first class the plaintiff alleges includes "those inmates accused of disciplinary infractions where a transfer is not contemplated" and the second class consists of "those people where the disciplinary hearing may result in transfer to the federal prison system" (emphasis supplied).

In our opinion of January 24, 1975, although our holding in the case did not require us to rule specifically on the point, we recommended that where an out of state transfer is likely to result from a major disciplinary infraction by an inmate or where a transfer is contemplated for punitive reasons, the hearing afforded the prisoner should incorporate at least the same procedures provided for those against whom major disciplinary charges are pressed within the facility.
1.

We have no reason to doubt that this recommendation will be followed and that the same procedures allowed those inmates who face discipline within the prison for major infractions of the institution's regulations will be provided to those inmates who face transfer to an out of state facility as punishment. At the same time our opinion recognized that valid administrative concerns alone can properly dictate the transfer of an inmate to state or federal facilities located in other jurisdictions, and in such instances equal protection of the law does not require procedures identical to those followed in disciplinary matters, provided that in each instance the inmate receives all of the due process to which he is entitled by the circumstances.

Nevertheless, the plaintiff argues that we misconceived the thrust of his equal protection claim which he says pertains to dissimilarities in the type of hearing provided when the subject of the hearing concerns activity which has been or will be referred

to the State's Attorney for criminal charges. Specifically he states he was denied equal protection of the law by not being afforded legal counsel nor an impartial hearing officer in an administrative transfer proceeding when he faced the possibility of being charged criminally for those activities which gave rise to the decision to transfer him. It is undeniable that Department of Corrections regulations require a hearing before an impartial hearing officer and the opportunity for the inmate to have legal counsel in disciplinary proceedings the subject matter of which may result in criminal charges. We consider these regulations commendable, but for reasons touched on below, these provisions in no way alter our opinion that neither equal protection nor due process require precisely the same procedures for administrative transfer proceedings as for disciplinary proceedings, whether or not the prisoner may be subsequently charged with a criminal offense arising out of the same facts which led or contributed to the decision to transfer him.

The Vermont Legislature and the Department of Corrections have wisely prescribed procedures to be followed in the case of inmates facing disciplinary action and in the case of those who may be transferred for administrative reasons. These two sets of procedures are for the benefit both of the inmate and of the officials who must conduct the hearing. The inmate learns of the procedural safeguards to which he is entitled, and the officials can refer to the proper manner to proceed in order to assure that the inmate's rights are protected. Clearly, the procedures for each type of hearing must be designed with the typical disciplinary or the typical administrative transfer situation in mind. The typical

administrative transfer may arise from reasons completely extrinsic to the inmate's actions and peculiar to the particular prison where he is housed, such as protection for the prisoner, overcrowding, health hazards, and the like. The decision to transfer lies in the discretion of the administrative authorities and is not an adjudicatory determination. See, United States ex rel. Haymes vs. Montanye, 505 F. 2d 977 (2nd Cir. 1974). If there were no settled procedures for disciplinary and transfer situations, officials would fact the necessity of developing proper procedures anew each time such a situation might arise. This necessity would waste time, delay administrative decisions which often must be made quickly, and would increase the likelihood of an error prejudicial to the inmate's legal rights.

Upon occasion, as in this instance, a situation will arise where an inmate's behavior may both make him subject to prison disciplinary action and give rise to a valid administrative reason to transfer him to another facility. In such circumstances we have held, and we reiterate here, that corrections officials may elect either to implement an administrative transfer or to discipline the inmate. In doing so, the prisoner's right to equal protection of the law is not violated since there is a rational basis for differences between the two sets of procedures which may be traced to their different natures and functions.

3.

In discussing the typical transfer hearing we have pointed out that in order to have a meaningful input into the decision to transfer, one way or another an inmate must have access to the

official in whose discretion the ultimate decision to transfer lies. The need for direct access may necessitate the use of a hearing officer who knows the administrative reasons which point towards transfer in order that his recommendation may carry some weight with the ultimate transfer authority. In the case at hand it meant a knowledge of Carlson's repeated escapes and the lack of adequate security at Windsor. Also, there is a valid reason why legal counsel should not be necessary at a transfer hearing. Because of the essentially discretionary nature of a transfer decision, a layman can present considerations for the decisionmaker's discretion fully as well as legal counsel, whereas a layman may be less skilled in making the kind of legal argument appropriate to a disciplinary proceedings which is adjudicatory in nature. For this reason legal counsel is less useful in an administrative transfer situation. These distinctions underlie and justify the differences between the two sets of procedures.

Plaintiff apparently claims that the fact that he might be charged criminally based upon the same facts which occasioned his transfer placed him in the same position vis a vis a subsequent criminal prosecution as an inmate who instead was subjected to prison disciplinary proceedings. We do not dispute the truth of plaintiff's assertion, and in fact he was convicted of crimes arising out of his March 11, 1974 escape after his transfer hearing had taken place. (Defendants' Exhibit E). But this fact does not remove the essential difference between the two types of proceedings,

nor does it undercut the rational basis for the two sets of procedures. Once sensible procedures have been arranged, it is certainly rational to follow them.

The decision to transfer Carlson rather than to put him through prison disciplinary proceedings did not deny him due process of law, even though he was later charged criminally on the basis of some of the same facts that occasioned his transfer. We have previously discussed the need for a transfer hearing officer who is familiar with the circumstances giving rise to a tentative decision to transfer. We only add here that the decision to bring criminal charges was made by the local prosecuting officer, an individual completely independent of the corrections officer and with no influence over the decision to transfer. In the instant case the plaintiff was not charged immediately by the state's attorney but only upon being returned to Vermont from the federal system in connection with another offense.⁴ It is impossible to know whether the plaintiff ever would have been charged criminally had he remained in the federal system throughout the duration of his sentence. It is entirely possible that the decision to transfer would have ended the matter at that point.

Further, the right to retained or appointed legal counsel is not a necessary adjunct of a prison disciplinary proceeding.

Wolff vs. McDonnell, 42 U.S.L.W. 5190 (July 8, 1974) (No. 73-679). That Vermont has seen fit to allow legal counsel at a prison disciplinary hearing when a charge based on the same facts has been referred to the state's attorney for prosecution is commendable

but not required by due process of law. As we stated in our opinion of January 24, 1975, we do not believe that the right to counsel exists at an administrative transfer hearing either.

The presence or absence of legal counsel at either an administrative or disciplinary hearing does not affect the validity of that hearing but only protects the interest of the prisoner in subsequent criminal proceedings arising out of the incidents which prompted the administrative or disciplinary proceedings in the first instance. Clearly, a conviction in a criminal matter cannot stand if it depends on statements elicited from a defendant who requested and was denied counsel while under interrogation.

Miranda vs. Arizona, 384 U.S. 436 (1966). Vermont could hardly claim it had complied with Miranda if it tried to introduce plaintiff's statement in a criminal trial after having denied him the right to confer with counsel at any sort of prior hearing when he had specifically requested that right. If plaintiff is concerned about making damaging statements in prison proceedings, his proper course of action is to make a motion to suppress improper evidence at any subsequent prosecution in state court rather than to remain mute at the transfer hearing. See Inmates of Attica Correctional Facility vs. Rockefeller, 453 F. 2d 12, 25 (2nd Cir. 1971) (Lumbard concurring). Thus the presence of counsel for the inmate at a disciplinary hearing likely to result in criminal charges is principally for the benefit of the state and not for the prisoner.

Additionally, we note that plaintiff did have the advice of counsel through a telephone conversation prior to the transfer

hearing. Even had this not been so, any disability imposed by the failure to allow him counsel at the hearing was removed when he had the opportunity in the subsequent state court prosecution to raise through counsel any alleged inadequate protection of his rights at the transfer hearing. Since he was convicted on April 17, 1974, of criminal violations arising out of his last escape, we may assume that he did not raise any such objections or that any objections he may have raised were without merit.

(See Defendants' Exhibit E).

Based on the foregoing considerations, plaintiff's motion for rehearing is denied. This disposition of the matter makes it unnecessary for us to decide whether Fed. R. Civ. P. 59(a) was properly invoked by plaintiff to raise the matters discussed herein.

DATED at Burlington in the District of Vermont this 13th day of March, 1975.

/s/ Albert W. Coffrin
District Judge

FOOTNOTES

1. Carlson vs. Moeykens, Civil No. 74-224 (D. Vt. Jan. 24, 1975 at 21)
2. Department of Corrections regulations regarding procedures for disciplinary action provide in part the following (Plaintiff's Exhibit 5):

* * *

7. The Disciplinary Committee shall consist of three impartial members, including a permanent Chairman appointed by the Supervising Officer.

* * *

10. You will have the opportunity to:

* * *

E. If you are charged with a violation which has been referred for criminal prosecution, you may be represented by legal counsel. If such even(t) a hearing officer may be appointed to take evidence.

3. It is conceivable, of course, that prison officials may choose to proceed both administratively and punitively, and if so as we have said, we consider that the procedures which provide the prisoner with the greater protection should be followed.

4. The exact nature of the particular criminal offense for which he was returned to Vermont does not appear from the evidence. During the time plaintiff was in Vermont for these proceedings he was charged with and convicted of crimes arising out of the escape of March 11, 1974.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WAYNE CARLSON,

Plaintiff,

v.

R. KENT STONEMAN, Commissioner of
Corrections for the State of Vermont,

PAUL DAVALLOU, Warden, Vermont State Penitentiary,

Civil Action File
No. 74-224

JULIUS V. MOEYKENS, Warden, Vermont State Penitentiary,

THREE UNKNOWN CORRECTIONAL OFFICERS,
acting in their capacities as Corrections Officers at the Vermont State Penitentiary,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Wayne Carlson, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from final judgment dated January 24, 1975, and the denial of a motion made pursuant to 59(a) entered in this action on the 13th day of March, 1975.

DATED at Montpelier, Vermont, this 10th day of April, 1975.

/s/ James R. Flett

JAMES R. FLETT

Defender, Correctional Facilities
Attorney for Plaintiff
State Office Building
Montpelier, VT 05602

/s/ Andrew B. Crane

ANDREW B. CRANE

Office of the

-150-Defender, Correctional Facilities